CLERK'S OFFICE 15482

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 130.

PACIFIC COAST STEAMSHIP COMPANY, PETITIONER,

vs.

THE BANCROFT-WHITNEY COMPANY AND A. HAAS, J. BARUCH, AND H. W. HELLMAN, SURVIVING PARTNERS OF THE FIRM OF HELLMAN, HAAS & COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

PETITION FOR CERTIORARI FILED SEPTEMBER 3, 1900.
CERTIORARI AND RETURN FILED OCTOBER 31, 1900.

(17,503.)

(17,508.)

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In the United States Circuit Court of Appeals for the Ninth Circuit.

PACIFIC COAST STEAMSHIP COMPANY (a Corporation), Claimant and Appellant,
vs.
BANCROFT-WHITNEY COMPANY (a Corporation), A. HAAS, J. Baruch, and H. W. Hellman, Surviving Partners of the Firm of Hellman, Haas & Company, Libelants and Appellees. } No. 454.

Transcript of Record.

Appeal from the district court of the United States for the northern district of California.

1 In the United States Circuit Court of Appeals for the Ninth Circuit.

PACIFIC COAST STEAMSHIP COMPANY, a Corporation, Appellant,
vs.
THE BANCROFT-WHITNEY COMPANY, a Corporation; A. HAAS, J. Baruch, and H. W. Hellman, Surviving Partners of the Firm of Hellman, Haas & Company, Appellees.

Stipulation as to Printing of Record.

It is hereby stipulated, pursuant to subdivision 7 of rule 23 of the rules of the above-entitled court, that the following specified portions only of the record on file in this court in the above-entitled proceeding need be printed, that is to say: All of said record save the following specified portions thereof to be omitted, to wit:

Omit all on pages 10 and 11.

Omit all on pages 16 and 17.

2 Omit all on page 18 after the words "Exceptions to libels," down "To the Hon. Wm. W. Morrow," and substitute "Style of court and title of cause."

Omit all on page 20.

Omit all on page 23 down to "Exceptions to libels," and substitute "Style of court and title of cause."

Omit all on page 34.

Omit all on page 35 after words "Decree overruling exceptions," down to "This cause coming on," and substitute "Style of court and title of cause."

Omit all on page 68 after words "Testimony filed May 9, 1896," down to "Monday, May 4, 1896," and substitute "Style of court and title of cause." Also, omit appearances and names of proctors, on page 68.

Omit all on page 103 down to word "Opinion," and substitute "Style of court and title of cause."

Omit all on page 117, after words "Order overruling motion for nonsuit," down to "In this cause," and substitute "Style of court and title of cause."

Omit all on page 198 after the words "The court here took an adjournment."

Omit all on page 217 down to word "Opinion," and substitute "Style of court and title of cause."

Omit all on page 252 after words "Interlocutory decree," down to "The above-entitled causes," and substitute "Style of court and title of cause."

Omit all on page 254, after "Report of Commissioner on libel of Bancroft-Whitney Co.," down to "Testimony on reference," and substitute "Style of court and title of cause."

3 Omit all on page 255, beginning with words "In the district court," down to "Commissioner's report," and substitute "Style of court and title of cause."

Omit all on page 257, after first line, to "Testimony on reference," and substitute "Style of court and title of cause."

Omit all on page 259, beginning with words "In the district court," down to "Commissioner's report," and substitute "Style of court and title of cause."

Omit all on page 261, after first line, to "The respondent," and substitute "Style of court and title of cause."

Omit all on page 262, after first line, to "Respondent and claimant," and substitute "Style of court and title of cause."

Omit all on page 265, after first line, to "The principal," and substitute "Style of court and title of cause."

Omit all on page 267.

Omit all on page 268, after "Final decree," to "This cause coming on," and substitute "Style of court and title of cause."

Omit all on page 270, after "Final decree," to "This cause coming on," and substitute "Style of court and title of cause."

Omit all on page 272, after "Petition for appeal," to "To the Hon. John J. De Haven," and substitute "Style of court and title of cause."

Omit all on page 273 down to "Assignment of errors" second appearing and substitute "Style of court and title of cause."

Omit all on pages 298, 299, 300, and 301.

Omit all on pages 304, 305, 306, 307, 308, 309, and 310.

4 Omit all on page 311, after "Stipulation for record," to "It is hereby stipulated," and substitute "Style of court and title of cause."

Omit all photographic exhibits, that is, Claimant's Exhibits No. 1, No. 2, and No. 3.

Omit second general average bond, that is, Claimant's Exhibit No. 6.

Print, with Claimant's Exhibit No. 5, the stipulation, attached thereto, relating to Bancroft-Whitney Co.

And the clerk of the above-entitled court is hereby requested to

proceed pursuant hereto, and to make the several substitutions above specified in printing such record.

Dated San Francisco, California, July 8th, 1898.

MILTON ANDROS,
Proctor for Appellees.
GEO. W. TOWLE, Jr.,
Proctor for Appellant.

(Endorsed:) Filed July 11th, 1898. Frank D. Monckton, clerk, by Meredith Sawyer, deputy clerk.

5 In the District Court of the United States of America for the Northern District of California. In Admiralty.

BANCROFT-WHITNEY COMPANY and Others, Joint Libelants; A. Haas, J. Baruch, and H. W. Hellman, Surviving Partners of the Firm of Hellman, Haas & Company, Libelants,
vs.
STEAMSHIP "QUEEN OF THE PACIFIC," etc., PACIFIC COAST Steamship Company, Claimant.

Petition of Appeal.

To the honorable United States circuit court of appeals for the ninth circuit:

The appeal of Pacific Coast Steamship Company, a corporation, claimant above named, respectfully shows:

That on the 28th day of April, 1892, the joint libels of Bancroft-Whitney Company, a corporation, and of A. Haas, J. Baruch, and H. W. Hellman, surviving partners of the firm of Hellman, Haas & Co., were exhibited to, and filed in the district court of the

6 United States for the northern district of California, against the S. S. "Queen of the Pacific," otherwise called "Queen," and all persons interested therein; each of said libellants claiming over fifty dollars damages, and said libellants severally praying, among other things, for the reasons set forth in their said several libels, that said steamer "Queen," her tackle, apparel, and furniture, be condemned and sold to pay the demands of said libelants and costs, in said libel mentioned.

That monition thereupon issued out of said court on said 28th day of April, 1892, and was placed in the hands of the marshal of said district, commanding him to attach and safely keep said steamer "Queen."

That said monition was returned to and filed in said district court, by said marshal, on the 3rd day of May, 1892, with the following indorsement thereon: "After due and diligent search I was unable to find the steamer 'Queen of the Pacific,' otherwise called 'Queen,' in my district, and return this monition unexecuted. Dated, May 3, 1892. W. G. Long, marshal. By A. L. Farish, deputy marshal."

On May 4, 1892, an alias monition was issued, and said steamer was thereafter attached by said marshal pursuant thereto.

On May 13, 1892, the claim of the Pacific Coast Steamship Company was filed in said proceeding and its stipulation for costs govern.

On the 17th day of May, 1892, claimant filed in said proceeding its exceptions to said libels, contesting the sufficiency of the same.

April 26, 1892, claimant entered into an admiralty stipulation in said cause in the sum of $31,000, with two sureties,
7 and thereafter procured the release to it of said steamer "Queen."

April 17th, 1894, the exceptions to said libels were overruled, and on July 3, 1894, claimant filed in said proceeding its verified answers to said several libels, praying that said libels be, severally, dismissed with its costs in that behalf, as by reference to said libels and to said answers may more fully appear.

That the said cause came on to be heard before the Hon. Wm. W. Morrow, judge of the said district court, on or about May 4, 12, 13, and June 4, 1896, upon the depositions and proofs taken in said cause, and the testimony and proofs adduced by the respective parties, and the said judge being advised thereon, on the 7th day of May, 1897, made an interlocutory decree in said cause, whereby it was, among other things, decreed that said several libelants in said cause recover damages, severally, against said steamer "Queen" for the causes in said libels alleged, as by reference to the said decree may more fully appear, under which decree a reference was had to the commissioner of this court, who on the 13th day of September, 1897, reported that there was due to Bancroft-Whitney Company, a corporation, libelant, the sum of $200, and that there was due to A. Haas, J. Baruch, and H. W. Hellman, surviving partners of the firm of Hellman, Haas & Company, libelants, the sum of $9,015.04; that on the 16th day of September, 1897, claimant filed in said cause its exceptions to said report of said commissioner, and on the 19th day of April, 1898, such exceptions were overruled and said report was in all things, as presented, con-
8 firmed by the said court, and on the 6th day of May, 1898, said court entered its final decrees in said cause upon said several libels.

And this appellant is advised and insists that the said decrees are erroneous, inasmuch as such libelants were not entitled to any damages in the premises.

And appellant for these and other reasons appeals from the whole of said decrees in favor of said Bancroft-Whitney Company, a corporation, and said A. Haas, J. Baruch, and H. W. Hellman, surviving partners of the firm of Hellman, Haas & Company, libelants, to the next circuit court of appeals to be held in said circuit, and on said appeal it intends to have said cause heard anew on the same exceptions, pleadings, and proofs, and appellant prays that the said decrees, and each thereof, and every part of each thereof, may be reversed with costs, and such other decree thereupon made as to the said circuit court of appeals shall seem just, and that the said ap-

pellees be condemned to pay to appellant its costs and damages in the premises.

And appellant prays that the record and proceedings may be returned to the said circuit court of appeals, and that the said decree may be reversed, or such other decree therein be made as to said circuit court of appeals shall seem just, and that the appellees may be condemned to pay appellant its costs and damages in the premises.

GEO. W. TOWLE, JR.,
Proctor for Claimant and Appellant.

(Endorsed:) Service of the within petition, and receipt of a copy, admitted this 14th day of May, 1898. Milton Andros, proctor for appellees. Filed May 14, 1898. Geo. E. Morse, clerk, by J. S. Manley, deputy clerk.

9 UNITED STATES OF AMERICA:

District Court of the United States of America for the Northern District of California. In Admiralty.

THE BANCROFT-WHITNEY COMPANY and Others, Joint Libelants,
vs.
THE STEAMSHIP "QUEEN OF THE PACIFIC," Otherwise Called the "Queen," etc., Claimant.

Libel of Bancroft-Whitney Company.

To the Honorable William W. Morrow, judge of the district court of the United States for the northern district of California:

The joint libel of The Bancroft-Whitney Company and others, joint libelants, against The Steamship "Queen of the Pacific," her tackle, apparel, and furniture, and against all persons lawfully intervening for their interest therein, in a cause of contract, civil and maritime, alleges:

The Libel of the Bancroft-Whitney Company.

I.

The libelant, The Bancroft-Whitney Company, avers that it
10 was at all the times hereinafter mentioned a corporation incorporated under the laws of the State of California, and having its principal place of business in the city and county of San Francisco, in said State.

II.

That on or about the 28th day of April, A. D. 1888, at the port of San Francisco, in the State of California, this libelant shipped in good order and condition one case of books on the steamship "Queen of the Pacific," then and there belonging to or employed by the Pacific Coast Steamship Company, a corporation, to be in and by said steamship transported to the port or place of San Diego, in said

State, and there to be delivered in like good order and condition as when received unto Bancroft-Whitney Co., and the said Pacific Coast Steamship Company, when it received said goods on board the said steamship for transportation as aforesaid, entered into a contract of affreightment in writing with this libelant, wherein it acknowledged to have received said goods in apparent good order, and then and there promised and agreed to transport said goods to said port or place of San Diego and there deliver them unto Bancroft-Whitney Co. in like good order as when received, certain perils in said agreement mentioned excepted. A copy of said agreement in said writing herein referred to is hereto annexed and made a part hereof.

III.

That said steamship thereafter sailed from the port of San Francisco, bound to said port or place of San Diego, with said
11 merchandise on board thereof, but notwithstanding said contract of affreightment in the last preceding article hereof mentioned, said merchandise was not delivered to the Bancroft-Whitney Co. at said port or place of San Diego or at any other place, in like good order as when received, but, on the contrary, said merchandise was returned to said port of San Francisco in a greatly damaged condition, by reason of having been wet with sea water during said voyage, which by reason of the negligence of said steamship company, its officers and servants, gained access to the interior of said ship, where said merchandise was stowed, to wit, on or about the 30th day of April, A. D. 1888.

IV.

That said steamship is now in the northern district of California.

V.

That in consequence of the injury and damage to said merchandise by sea water as in the last preceding article herein is mentioned and set forth, the libelants have sustained damages in the sum of two hundred and ten dollars.

VI.

That all and singular the premises are true, and within the admiralty and maritime jurisdiction of this honorable court.

For a further, separate, and second cause of action this libelant avers:

I.

That on or about the 27th day of April, A. D. 1888, at the
12 port of San Francisco, in the State of California, this libelant shipped in good order and condition three cases of books on the steamship "Queen of the Pacific," then and there belonging to or employed by the Pacific Coast Steamship Company, a corporation, to be in and by said steamship transported to the port or place

of San Diego in said State, and there to be delivered in like good order and condition as when received unto Victor E. Shaw, and the said Pacific Coast Steamship Company, when it received said goods on board the said steamship for transportation as aforesaid, entered into a contract of affreightment in writing with this libelant, wherein it acknowledged to have received said goods in apparent good order, and then and there promised and agreed to transport said goods to said port or place of San Diego, and there deliver them unto Victor E. Shaw in like good order as when received, certain perils in said agreement mentioned excepted. A copy of said agreement in writing herein referred to is hereto annexed and made a part hereof.

III.

That said steamship thereafter sailed from the port of San Francisco, bound to said port or place of San Diego with said merchandise on board thereof, but notwithstanding said contract of affreightment in the last preceding article hereof mentioned, said merchandise was not delivered to Victor E. Shaw, at said port or place of San Diego or at any other place, in like good order as when received, but, on the contrary, said merchandise was returned to said port of San Francisco in a greatly damaged condition, by reason of having been wet with sea water during said voyage,
13 which by reason of the negligence of said steamship company, its officers and servants, gained access to the interior of said ship where said merchandise was stowed, to wit, on or about the 30th day of April, A. D. 1888.

IV.

That said steamship is now in the northern district of California.

V.

That in consequence of the injury and damage to said merchandise by sea water as in the last preceding article herein is mentioned and set forth, the libelants have sustained damages in the sum of four hunded and fifty-five dollars.

VI.

That all and singular the premises are true, and within the admiralty and maritime jurisdiction of this honorable court.

Wherefore, this libelant prays that process in due form of law, according to the course of this honorable court, in causes of admiralty and maritime jurisdiction, may issue against the said steamship, her tackle, apparel, and furniture, and that all persons claiming any right or interest therein may be cited to appear and answer all and singular the matters aforesaid; that this honorable court will be pleased to decree the payment of the said sum of two hundred and ten dollars and four hundred and fifty-five dollars, aforesaid, with costs and interest, and that said vessel, her tackle, apparel, and fur-

niture, be condemned and sold to pay the same; and that
14 this libelant have such other and further relief in the premises as in law and justice it may be entitled to receive.

BANCROFT-WHITNEY CO.,
By F. G. SANBORN, *Treasurer.*

Sworn to before me this 28th day of ——, A. D. 1892.
[SEAL.] GEO. T. KNOX,
Notary Public.

(Endorsed:) Filed April 28, 1892. Southard Hoffman, clerk.

Duplicate.) Pacific Coast Steamship Co.

No. —. SAN FRANCISCO, *April* 27, 1888.

Received of Bancroft-Whitney Co. to be shipped on board of the P. C. S. S. Co.'s steamer Queen of the Pac. or on board of any other steamer of the company, or on board of any steamer the Co. may employ, the following property, in apparent good order, except as noted, value, weight, contents and conditions being unknown to said Co., marked, as indicated below, to be delivered at San Diego to Victor E. Shaw or assigns, subject to the conditions printed on the back of this receipt.

Marked Victor E. Shaw, San Diego, Cal.

No. of pkgs.	Articles.	Weight.	Feet.
Three.....	(3) cases books.....		

Paid $2.65.
SMITH.

Prepaid.

—— ——, *Agent.*

Conditions.

The within goods are shipped and received, subject to the following conditions:

If the consignee is not on hand to receive the goods, package by package, as discharged, then the company may deliver them to the wharfinger or any other party or person, believed by said company to be responsible, and who will take charge of said goods and pay the freight on the same. The responsibility of said company shall cease immediately on the delivery of the said goods from the ship's tackles.

The steamer on which the within goods are carried shall have leave to tow and assist vessels: to sail with or without pilots: to tranship to any other of the company's steamer or steamers employed by said company: to lighter from steamer to steamer, or from steamer to shore; to deliver to other steamers, companies, per-

sons, or forwarding agents any of the within goods destined for ports or places at which the said company's vessel on which they are carried does not call. The company shall not be held responsible for any damage or loss resulting from fire at sea or in port, accident to or from machinery, boilers, or steam, or any other accident, or dangers of the seas, rivers, roadsteads, harbors, or of sail or steam navigation of what nature or kind soever.

It is expressly understood that the said company shall not be liable or accountable for weight, leakage, breakage, shrinkage, rust, loss, or damage arising from insecurity of package or damage to cargo by vermin, burning, or explosion of articles on freight or otherwise, or loss or damage on account of inaccuracy or omissions in marks or descriptions, effects of climate, or from unavoidable detention or delay; nor for loss of specie, bullion, bank notes, Government notes, bonds, or consols, jewelry or any property of special value unless shipped under its proper title or name, and extra freight paid thereon.

Live stock, trees, shrubbery, and all kinds of perishable property, at owner's risk of frost and decay. Oils and all other liquids at owner's risk of leakage, unless caused by improper stowage.

It is hereby understood that wool in bales, dry hides, butter and egg boxes, and all other packages, must be, each and every package, marked with the full address of the consignee; and if not so marked, it is agreed that the delivery of the full number of packages, as within mentioned, without regard to quality, shall be deemed a correct delivery, and in full satisfaction of this receipt.

It is agreed, that in settlement of any claim for loss of or damage to any of the within-mentioned goods, said claim shall be restricted to the cash value of such goods at the port of shipment at the date of shipment.

It is agreed that the person or party delivering any goods to the said company for shipment, is authorized to sign the shipping receipt for the shipper.

On delivery of the goods within enumerated, as provided herein, this receipt shall stand canceled whether surrendered or not.

It is expressly agreed that all claims against the P. C. S. S. Co., or any of the stockholders of said company, for damage to or loss of any of the within merchandise, must be presented to the company within thirty days from date hereof; and that after thirty days from date hereof, no action, suit or proceeding, in any court of justice, shall be brought against said P. C. S. S. Co., or any of the stockholders thereof, for any damage to or loss of said merchandise; and the lapse of said thirty days shall be deemed a conclusive bar and release of all right to recover against said company, or any of the stockholders thereof, for any such damage or loss.

Duplicate.) Pacific Coast Steamship Co.

No. —. SAN FRANCISCO, *April* 28, 1888.

Received of Bancroft-Whitney Co. to be shipped on board of the P. C. S. S. Co.'s steamer Queen of the Pac. or on board of any other

steamer of the company, or on board of any steamer the Co. may employ, the following property, in apparent good order, except as noted, value, weight, contents and conditions being unknown to said Co., marked as indicated below, to be delivered at San Diego to Bancroft-Whitney Co. or assigns, subject to the conditions printed on the back of this receipt.

Marked Bancroft-Whitney Co., San Diego, Cal.

No. of pkgs.	Articles.	Weight.	Feet.
One.....	(1) c. books.....		

Paid $1.15.
SMITH.

Prepaid.

——— ———, *Agent.*

Conditions.

The within goods are shipped and received, subject to the following conditions:

If the consignee is not on hand to receive the goods, package by package, as discharged, then the company may deliver them to the wharfinger or any other party or person, believed by said company to be responsible, and who will take charge of said goods and pay the freight on the same. The responsibility of said company shall cease immediately on the delivery of the said goods from the ship's tackles.

The steamer on which the within goods are carried shall have leave to tow and assist vessels; to sail with or without pilots; to tranship to any other of the company's steamer or steamers employed by said company; to lighter from steamer to steamer, or from steamer to shore; to deliver to other steamers, companies, persons, or forwarding agents any of the within goods destined for ports or places at which the said company's vessel on which they are carried does not call. The company shall not be held responsible for any damage or loss resulting from fire at sea or in port, accident to or from machinery, boilers, or steam, or any other accident, or dangers of the seas, rivers, roadsteads, harbors, or of sail or steam navigation of what nature or kind soever.

It is expressly understood that the said company shall not be liable or accountable for weight, leakage, breakage, shrinkage, rust, loss, or damage arising from insecurity of package or damage to cargo by vermin, burning, or explosion of articles on freight or otherwise, or loss or damage on account of inaccuracy or omissions in marks or descriptions, effects of climate, or from unavoidable detention or delays; nor for loss of specie, bullion, bank notes, government notes, bonds, or consols, jewelry or any property of special

value unless shipped under its proper title or name, and extra freight paid thereon.

Live stock, trees, shrubbery, and all kinds of perishable property, at owner's risk of frost and decay. Oils and all other liquids at owner's risk of leakage, unless caused by improper storage.

It is hereby understood that wool in bales, dry hides, butter and egg boxes, and all other packages, must be, each and every package, marked with the full address of the consignee; and if not so marked, it is agreed, that the delivery of the full number of packages, as within mentioned, without regard to quality, shall be deemed a correct delivery, and in full satisfaction of this receipt.

It is agreed, that in settlement of any claim for loss of or damage to any of the within-mentioned goods, said claim shall be restricted to the cash value of such goods at the port of shipment at the date of shipment.

It is agreed that the person or party delivering any goods to the said company for shipment, is authorized to sign the shipping receipt for the shipper.

On delivery of the goods within enumerated, as provided herein, this receipt shall stand canceled whether surrendered or not.

It is expressly agreed that all claims against the P. C. S. S. Co., or any of the stockholders of said company, for damage to or loss of any of the within merchandise, must be presented to the company within thirty days from date hereof; and that after thirty days from date hereof, no action, suit or proceeding, in any court of justice, shall be brought against said P. C. S. S. Co., or any of the stockholders thereof, for any damage to or loss of said merchandise; and the lapse of said thirty days shall be deemed a conclusive bar and release of all right to recover against said company, or any of the stockholders thereof, for any such damage or loss.

15 *Libel of Hellman, Haas & Co.*

I.

The libelants aver that A. Haas, J. Baruch, and H. W. Hellman and J. Haas were at all the times hereinafter mentioned partners, doing business under the firm name and style of Hellman, Haas & Co. That J. Haas died in June, 1889, and that the libelants, A. Haas, J. Baruch, and H. W. Hellman, are the sole surviving partners of said firm.

II.

That on or about the — day of April, A. D. 1888, at the port of San Francisco, in the State of California, Farnsworth & Ruggles shipped in good order and condition fifteen hundred and thirty-eight packages of merchandise, more particularly described in the bill of lading hereunto annexed and made part hereof on the steamship "Queen of the Pacific," then and there belonging to or employed by the Pacific Coast Steamship Company, a corporation,

to be in and by said steamship transported to the port or place of San Pedro, in said State, and there to be delivered in like good order and condition as when received unto said firm of Hellman, Haas & Co., and the said Pacific Coast Steamship Company, when it received said goods on board the said steamship for transportation as aforesaid, entered into a contract of affreightment in writing with this libelant, wherein it acknowledged to have received said goods in apparent good order, and then and there promised and agreed to transport said goods to said port or place of San Pedro and
16 there deliver them unto said firm of Hellman, Haas & Co. in like good order as when received, certain perils in said agreement mentioned excepted. A copy of said agreement in writing herein referred to is hereto annexed and made a part hereof.

III.

That said steamship thereafter sailed from the port of San Francisco, bound to said port or place of San Pedro, with said merchandise on board thereof, but notwithstanding said contract of affreightment in the last preceding article hereof mentioned, said merchandise was not delivered to said firm of Hellman, Haas & Co. at said port or place of San Pedro or at any other place, in like good order as when received, but, on the contrary, said merchandise was returned to said port of San Francisco in a greatly damaged condition by reason of having been wet with sea water during said voyage, which by reason of the negligence of said steamship company, its officers and servants, gained access to the interior of said ship, where said merchandise was stowed, to wit, on or about the 30th day of April, A. D. 1888.

IV.

That said steamship is now in the northern district of California.

V.

That in consequence of the injury and damage to said merchandise by sea water as in the last preceding article herein is mentioned and set forth, the libelants have sustained damages in the sum of eight thousand nine hundred fifty-two $\frac{4}{100}$ dollars.

17 VI.

That all and singular the premises are true, and within the admiralty and maritime jurisdiction of this honorable court.

For a further, separate, and second cause of action, the libelants aver:

I.

That on or about the 26th day of April, A. D. 1888, at the port of San Francisco, in the State of California, Downing & Schmidt shipped in good order and condition thirteen cases of drugs on the

steamship "Queen of the Pacific," then and there belonging to or employed by the Pacific Coast Steamship Company, when it received said goods on board the said steamship for transportation as aforesaid, entered into a contract of affreightment in writing with this libelant, wherein it acknowledged to have received said goods in apparent good order, and then and there promised and agreed to transport said goods to said port or place of San Pedro, and there deliver them unto Hellman, Haas & Co. in like good order as when received, certain perils in said agreement mentioned excepted. A copy of said agreement in writing herein referred to is hereto annexed and made a part hereof.

III.

That said steamship thereafter sailed from the port of San Francisco, bound to said port or place of San Pedro with said merchandise on board thereof, but notwithstanding said contract of affreightment in the last preceding article hereof mentioned, said merchandise was not delivered to said Hellman, Haas & Co. at said port
18 or place of San Pedro or at any other place, in like good order as when received, but, on the contrary, said merchandise was returned to said port of San Francisco in a greatly damaged condition, by reason of having been wet with sea water during said voyage, which by reason of the negligence of said steamship company, its officers and servants, gained access to the interior of said ship, where said merchandise was stowed, to wit, on or about the 30th day of April, A. D. 1888.

IV.

That said steamship is now in the northern district of California.

V.

That in consequence of the injury and damage to said merchandise by sea water as in the last preceding article herein is mentioned and set forth, the libelants have sustained damages in the sum of sixty-three $\frac{20}{100}$ dollars, or thereabouts.

VI.

That all and singular the premises are true, and within the admiralty and maritime jurisdiction of this honorable court.

Wherefore, these libelants pray that process in due form of law, according to the course of this honorable court in causes of admiralty and maritime jurisdiction, may issue against the said steamship, her tackle, apparel, and furniture, and that all persons claiming any right or interest therein may be cited to appear and answer all and singular the matters aforesaid; that this
19 honorable court will be pleased to decree the payment of the several sums aforesaid with costs and interest, and that said vessel, her tackle, apparel, and furniture be condemned and sold to pay the same; and that these libelants have such other and further

relief in the premises as in law and justice they may be entitled to receive.

P. HAAS,
J. BARUCH,
H. W. HELLMAN,
By their attorney-in-fact for this purpose—
THE MAGDEBURG GENERAL INSURANCE COMPANY,
By GUTTE AND FRANK,
General Agents of said Company.

Sworn to before me this 28th day of April, A. D. 1892, by Isador Gutte.

[SEAL.] JAMES L. KING,
Notary Public in and for the City and County of San Francisco, State of California.

Isadore Gutte deposes that the within-named libelants are out of the northern district of California, and more than one hundred miles from the city of San Francisco; that the Magdeburg General Insurance Company is, by subrogation, duly authorized to bring the foregoing action in the name of the libelants therein mentioned; that the firm of Gutte and Frank is the general agent at San Francisco of said insurance company, and that he is a member of said firm.

(Signed) I. GUTTE.

(Endorsed:) Filed April 28, 1892. Southard Hoffman, clerk.

20 Form 50.

Pacific Coast Steamship Company.

[Vignette.]

Freight payable in U.S. gold coin.

Marks:

H H and Co.
L. A.

Shipped by Farnsworth & Ruggles per the Pacific Coast Steamship Company's line of steamers, to be forwarded on the steamer Queen or on some other of the company's steamers, or on some steamers in the employ of said company now lying at the port of San Francisco and bound for the port below named *the below-mentioned port*, the following property, in apparent good order, except as noted; value, weight, contents and condition of contents being unknown to said company, marked as indicated in the margin, to be delivered at the vessel's tackle, in like apparent good order and condition, at the port of *San Francisco unto* San Pedro, unto Hellman, Haas & Co. or assigns, he or they paying freight, on delivery, at the rate of tariff rates *dollars* per ton of 2,000 lbs., or 40 cubic feet, as the case may be, with — per cent. primage and average, and charges advanced by the company, to say:

See back.

subject to the following conditions, which are made a part of this bill of lading: If the consignee is not on hand to receive the goods, package by package, as discharged, then the company may deliver them to the wharfinger or any other party or person, believed by said company to be responsible, and who will take charge of said goods and pay the freight on the same. The responsibility of the company shall cease immediately on the delivery of the goods from the ship's tackle. The steamer shall have leave to tow and assist vessels; to sail with or without pilots; to tranship to any other of the company's steamers, or steamers employed by said company; to lighter from steamer to steamer, or between steamer and shore; to ship by any other forwarding company or conveyance goods destined for ports or places off the route, or beyond the terminus of said steamer, but under no circumstances shall the company be held responsible for any damage to or loss of said goods after the same shall be unhooked from the ship's tackle. The company shall not be held responsible or accountable for the acts of God, restraint of Government, enemies, privateers, letters of marque, rising of passengers or crew, pirates, robbers, thieves, barratry, collisions, fire at sea or in port, accidents to or from machinery, boilers or steam, or any other accidents or dangers of the seas, rivers, roadsteads or harbors, or of sail or steam navigation, of what nature or kind soever. The company shall not be liable, or accountable for the hidden contents of packages, for weight, leakage, breakage, shrinkage, rust, loss or damage arising from insecurity of package, or damage to cargo by vermin, burning or explosion of articles, on freight or otherwise, or loss or damage on account of inaccuracy or omission in marks or descriptions, effects of climate, or from unavoidable detention or delay; nor for the loss of specie, bullion, bank notes, Government notes, bonds or consols, jewelry, or any property of special value, unless shipped under its proper title or name and extra freight paid thereon.

Live stock, trees, shrubbery, and all kinds of perishable property, at owner's risk of frost and decay. Oils and other liquids at owner's risk of leakage, unless caused by improper storage. Wool in bales, dry hides, butter and egg boxes, must be, each and every package, marked with the full address of the consignee; and if not so marked, it is understood that the delivery of the full number of packages, as mentioned, without regard to quality, shall be deemed a correct delivery, and in full satisfaction of this bill of lading.

All goods packed in bales are taken as shipped in bad order. The ship will not be responsible for damage or loss of the contents. Glass or articles contained in glass, or any articles of a fragile or perishable nature, taken at shipper's risk only; and the shipper agrees that the steamship on which these goods are shipped shall not be held responsible for any injury or damage to goods not properly packed and secured for transportation. Extrahazardous goods, such as powder, coal oil, acids, turpentine, fire-works, vitriol, lime, etc., will be taken on deck at shipper's risk only, and will be charged special rates of freight.

All freight must be taken from ship's tackle immediately after

the vessel is ready to discharge, without regard to weather, and shall be received by the consignee, package by package, as so delivered; otherwise it may be, at his option, landed by the master and stored, or returned to port of shipment, at the expense of the consignee or shipper, and at his or their risk of any nature whatever.

In case the consignee, after notice so to do, refuses or neglects to pay freight and charges, and to receive the goods, the company may store the same in any suitable place belonging to the company, or to any other person, and if such consignee neglect or fail within thirty days thereafter to pay freight and charges, including cost of storage, and receive the goods, the company may sell them either at public or private sale, and out of the proceeds of sale deduct and retain all moneys due the company for freight, charges, storage and expenses of sale. If the company store said goods in its own store it shall be entitled to charge therefor the customary charge for such storage.

The company, or the master of the steamer, may dispose at any time of any goods of a perishable nature, when it is apparent that said perishable goods would become decayed or worthless before they could be delivered to the consignee or owner.

Freight shall be considered earned, lost or not, and on the happening of any accident whereby the steamer shall become disabled, the company shall have the right to forward the above-mentioned packages to the ports of destination on its own route and shall receive extra compensation for such service, whether performed by its own vessels or those of strangers; and in case of salvage service rendered to aforesaid merchandise or treasure during the voyage, by a vessel or vessels of the said company, such salvage service shall be paid for as fully as if such salving vessel or vessels belonged to strangers.

It is understood that in the settlement of any claim for loss of or damage to any of the above-mentioned goods, said claim shall be restricted to the cash value of such goods at the port of shipment at the date of shipment.

In case of detention in the Columbia river by ice, the steamer is to have the right to discharge cargo for Portland, at Astoria, to be stored at the risk and expense of the consignees, and delivered on some subsequent voyage, or reshipped at the expense and risk of the consignees, at their option. It is also understood that the steamer is to have the privilege, in case of low water in the Willamette river, to reship cargo at the mouth of said river, at the expense and risk of the consignees.

It is also understood, that if by fog, bad weather, or other causes the steamer be prevented from discharging cargo at port of delivery, the steamer shall have the privilege of returning said goods to the port of San Francisco, there to be stored at the expense and risk of the owners, until such time as they can be delivered with safety at the port of destination.

The collector of the port is hereby authorized to grant a general order for discharge immediately after the entry of the ship at the custom-house.

On delivery of the goods enumerated, as provided herein, this bill of lading shall stand canceled, whether surrendered or not.

It is expressly agreed that all claims against the steamship company, or any of the stockholders of said company, for damage to or loss of any merchandise, must be presented to the company within 30 days from date hereof; and that after 30 days from date hereof, no action, suit or proceeding, in any court of justice, shall be brought against said steamship company, or any of the stockholders thereof, for any damage to or loss of said merchandise; and the lapse of said 30 days shall be deemed a conclusive bar and release of all right to recover against said company, or any of the stockholders thereof, for any damage or loss.

In witness whereof, the master, purser, or agent of said steamer, and the shipper, or his or their agent, hath signed 4 bills of lading, all of this tenor and date, one of which being accomplished, the others to stand void.

Dated in San Francisco, the 30th day of April, 1888.

A. McD. MAYO,
For Pacific Coast Steamship Co.

A. ROSENBERG,
For Shipper.

[Printed across the face:] Non-negotiable.

[Stamped on the face:] Pacific Coast Steamship Co., San Francisco, Feb. 18, 1898.

[On the back.]

50 cs. canned vegetables.
250 kegs nails.
200 s'ks rice.
200 " "
20 packages tea.
3 bbls. currants.
420 mats rice.
250 bbls. sugar.
100/2 " "
10 cases salad oil. Owner's risk.
35 " pickles.

21 Duplicate.)

Pacific Coast Steamship Co.

No. —. SAN FRANCISCO, *April* 26, 1888.

Received of Downing & Schmidt, to be shipped on board of the P. C. S. S. Co.'s steamer Queen or on board of any other steamer of the company, or on board of any steamer the Co. may employ, the following property, in apparent good order, except as noted, value, weight, contents and conditions being unknown to said Co., marked, as indicated below, to be delivered at San Pedro

to Hellman, Haas & Co., Los Angeles, or assigns, subject to the conditions printed on the back of this receipt.

Marked H H & Co., Los Angeles, Cal.

No. of pkgs.	Articles.	Weight.	Feet.
13 cs.....	Drugs		

Lambert.
(13.)

——— ———, *Agent.*

22 *Conditions.*

The within goods are shipped and received, subject to the following conditions:

If the consignee is not on hand to receive the goods, package by package, as discharged, then the company may deliver them to the wharfinger or any other party or person, believed by said company to be responsible, and who will take charge of said goods and pay the freight on the same. The responsibility of said company shall cease immediately on the delivery of the said goods from the ship's tackles.

The steamer on which the within goods are carried shall have leave to tow and assist vessels: to sail with or without pilots: to tranship to any other of the company's steamer or steamers employed by said company: to lighter from steamer to steamer, or from steamer to shore; to deliver to other steamers, companies, persons, or forwarding agents any of the within goods destined for ports or places at which the said company's vessel on which they are carried does not call. The company shall not be held responsible for any damage or loss resulting from fire at sea or in port, accident to or from machinery, boilers, or steam, or any other accident, or dangers of the seas, rivers, roadsteads, harbors, or of sail or steam navigation of what nature or kind soever.

It is expressly understood that the said company shall not be liable or accountable for weight, leakage, breakage, shrinkage, rust, loss, or damage arising from insecurity of package or damage to cargo by vermin, burning, or explosion of articles on freight or otherwise, or loss or damage on account of inaccuracy or omissions in marks or descriptions, effects of climate, or from unavoidable detention or delay; nor for loss of specie, bullion, bank notes, Government notes, bonds, or consols, jewelry or any property of special value unless shipped under its proper title or name, and extra freight paid thereon.

Live stock, trees, shrubbery, and all kinds of perishable property, at owner's risk of frost and decay. Oils and all other liquids at owner's risk of leakage, unless caused by improper stowage.

It is hereby understood that wool in bales, dry hides, butter and

egg boxes, and all other packages, must be, each and every package, marked with the full address of the consignee; and if not so marked, it is agreed that the delivery of the full number of packages, as within mentioned, without regard to quality, shall be deemed a correct delivery, and in full satisfaction of this receipt.

It is agreed, that in settlement of any claim for loss of or damage to any of the within-mentioned goods, said claim shall be restricted to the cash value of such goods at the port of shipment at the date of shipment.

It is agreed that the person or party delivering any goods to the said company for shipment, is authorized to sign the shipping receipt for the shipper.

On delivery of the goods within enumerated, as provided herein, this receipt shall stand canceled whether surrendered or not.

It is expressly agreed that all claims against the P. C. S. S. Co., or any of the stockholders of said company, for damage to or loss of any of the within merchandise, must be presented to the company within thirty days from date hereof; and that after thirty days from date hereof, no action, suit or proceeding, in any court of justice, shall be brought against said P. C. S. S. Co., or any of the stockholders thereof, for any damage to or loss of said merchandise; and the lapse of said thirty days shall be deemed a conclusive bar and release of all right to recover against said company, or any of the stockholders thereof, for any such damage or loss.

23 *Monition. Filed April 28th*, 1892.

NORTHERN DISTRICT OF CALIFORNIA, *ss*:

[SEAL.] The President of the United States of America to the marshal of the United States for the northern district of California, Greeting:

Whereas, a libel hath been filed in the district court of the United States for the northern district of California, on the 28th day of April, in the year of our Lord one thousand eight hundred and ninety-two, by the Bancroft-Whitney Company, and others, joint libelants, against The Steamship "Queen of the Pacific," her tackle, etc., otherwise called the "Queen," for the reasons and causes in the said libel mentioned, and praying the usual process and monition of the said court in that behalf to be made, and that all persons interested in the said steamship, etc., or vessel, her tackle, etc., may be cited in general and special to answer the premises and all proceedings being had that the said steamship etc., or vessel her tackle, etc., may for the causes in the said libel mentioned be condemned and sold to pay the demand of the libelant:

24 You are therefore hereby commanded to attach the said steamship or vessel, her tackle, etc., and to retain the same in your custody until the further order of the court respecting the same, and to give due notice to all persons claiming the same, or knowing or having anything to say why the same should not be condemned and sold pursuant to the prayer of the said libel, that

they be and appear before the said court, to be held in and for the northern district of California, on the 10th day of May, A. D. 1892, at eleven o'clock in the forenoon of the same day, if that day shall be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter, then and there to interpose a claim for the same, and to make their allegations on that behalf. And what you shall have done in the premises do you then and there make return thereof, together with this writ.

Witness, the Hon. Wm. W. Morrow, judge of said court, at the city of San Francisco, in the northern district of California, this 28th day of April, in the year of our Lord one thousand eight hundred and ninety-two, and of our Independence the one hundred and sixteenth.

SOUTHARD HOFFMAN, *Clerk.*

MILTON ANDROS,
Proctor for Libelants.

After due and diligent search I was unable to find the steamer "Queen of the Pacific," otherwise called "Queen," in my
25 district. I return the monition unexecuted.

Dated May 3d, 1892.

W. G. LONG,
U. S. Marshal,
By A. L. FARISH,
Deputy Marshal.

(Endorsed:) Monition, returnable May 10th, 1892. Milton Andros, proctor for libelant. Issued April 28th, 1892. Filed May 3d, 1892. Southard Hoffman, clerk, by J. S. Manley, deputy clerk.

Monition. Filed May 4th, 1892.

NORTHERN DISTRICT OF CALIFORNIA, *ss*:

[SEAL.] The President of the United States of America to the marshal of the United States for the northern district of California, Greeting:

Whereas, a libel hath been filed in the district court of the United States for the northern district of California, on the 28th day of April, in the year of our Lord one thousand eight hundred and ninety-two, by the Bancroft-Whitney Company and others, joint libelants, against The Steamship "Queen of the Pacific," otherwise called the "Queen," etc., for the reasons and causes in the said libel mentioned, and praying the usual process and monition of the said court in that behalf to be made, and that all persons interested in the said steamship, etc., or vessel, her tackle, etc., may be cited
26 in general and special to answer the premises, and all proceedings being had that the said steamship, etc., or vessel, her tackle, etc., may for the causes in the said libel mentioned, be condemned and sold to pay the demands of the libelant:

You are, therefore, hereby commanded to attach the said steam-

ship, etc., or vessel, her tackle, etc., and to detain the same in your custody until the further order of the court respecting the same, and to give due notice to all persons claiming the same or knowing or having anything to say why the same should not be condemned and sold pursuant to the prayer of the said libel, that they be and appear before the said court, to be held in and for the northern district of California, on the 17th day of May, A. D. 1892, at eleven o'clock in the forenoon of the same day, if that day shall be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter, then and there to interpose a claim for the same, and to make their allegations on that behalf. And what you shall have done in the premises do you then and there make return thereof, together with this writ.

Witness, the Hon. Wm. W. Morrow, judge of said court, at the city of San Francisco, in the northern district of California, this 4th day of May, in the year of our Lord one thousand eight hundred and ninety-two, and of our Independence the one hundred and sixteenth.

SOUTHARD HOFFMAN, *Clerk.*

MILTON ANDROS,
Proctor for Libelants.

27 In obedience to the within monition, I attached the steamship "Queen of the Pacific," therein described, on the 17th day of May, 1892, and have given due notice to all persons claiming the same that this court will, on the 17th day of May 1892 (if that day should be a day of jurisdiction; if not, on the next day of jurisdiction thereafter), proceed to the trial and condemnation thereof, should no claim be interposed for the same.

Dated May 17th, 1892.

W. G. LONG,
U. S. Marshal,
By J. T. GREY, *Deputy.*

An order having been made by the court herein allowing the United States marshal to amend his return, I hereby amend the above return so as to read that "I attached the steamship 'Queen of the Pacific,' therein on the 4th day of May, 1892," instead of "17th day of May, 1892."

Dated June 13, 1892.

W. G. LONG,
U. S. Marshal,
By J. T. GREY, *Deputy.*

(Endorsed:) Monition, returnable May 17th, 1892. Milton Andros, proctor for libellants. Issued May 4th, 1892. Filed May 17th, 1892. Southard Hoffman, clerk, by J. S. Manley, deputy clerk.

28 (Style of Court and Title of Cause.)

Exceptions to Libel.

To the Honorable William W. Morrow, judge of the district court of the United States for the northern district of California:

The exceptions of the Pacific Coast Steamship Company, a corporation, owner and claimant of the said steamship "Queen of the Pacific," etc., to the libel of the said Bancroft-Whitney Co., a corporation, and to the libels of each and every and all those persons, partnerships, and corporations, joint libelants or colibelants with said Bancroft-Whitney Co., against said steamer in the above-entitled proceeding, and filed in the above-entitled cause, upon the gounds following:

First exception. For that the said libel and each of said libel-shows that libelant and each of said libelants has no cause of action against and no lien upon the said steamship "Queen of the Pacific," otherwise called "Queen."

Second exception. For that the said libel and each of said libels shows that the cause of action or ground of complaint alleged in said libel and in said libels each and all is and are causes of action, if any, against the said Pacific Coast Steamship Co., and not against said steamship.

Third exception. For that the cause and causes of action set forth in said libel and in said libels, each, every, and all thereof, is and are in said libel and in said several libels shown to have
29 been waived and abandoned by each of said libelants respectively, and prior to the filing of the said libel and libels herein under the provisions of a special contract made in that behalf by each of said libelants with the said Pacific Coast Steamship Company, as in said libel alleged.

Fourth exception. For that said libel and each of said libels shows that the demand and demands asserted therein and thereby is and are, and each of them is and all of them are, stale, neglected, and legally abandoned, and are barred by virtue of the laws of the State of California relating thereto, to wit: sections 337 and 338 of the C. C. P., and sections 2174, 2909, and 2911 of the Civil Code of said State.

And further excepting to said libel and said libels claimant alleges that this court has not jurisdiction in the matters alleged, because said steamship "Queen of the Pacific," otherwise called "Queen," etc., was not when said libel and said libels were filed in this court within the northern district of California or within the jurisdiction of this honorable court.

And further excepting to said libel and said libels claimant alleges that said steamship was not attached by the marshal upon process issued in this proceeding until the 4th day of May, 1892, more than four years after the alleged injury and injuries complained of, prior to which time any lien theretofore existing upon said steamer by reason of any of the matters alleged in said libel

and said libels had expired by special contract, alleged, and by operation of law.

In all which particulars the said libel is insufficient, and
30 therefore the said claimant is not bound to answer the same; and he prays that the said libel may be dismissed with costs.

Dated this 16th day of May, 1892.

GEO. W. TOWLE, JR.,
Proctor for Claimant.

(Endorsed:) Service of the within exceptions and receipt of copy admitted this 16th day of May, 1892. Milton Andros, proctor for libelants. Filed May 17th, 1892. Southard Hoffman, clerk, by J. S. Manley, dep. clerk.

District Court of the United States for the Northern District of California. In Admiralty.

Admiralty Stipulation.

No. 10301.

Stipulation. Entered into in pursuant to the rules of practice of this court.

Whereas, a libel was filed on the 28th day of April, in the year of our Lord one thousand eight hundred and ninety-two, by the Bancroft-Whitney Company and others against The Steamship "Queen of the Pacific," otherwise called the "Queen," etc., for the reasons and causes in the said libel mentioned; and whereas, the said steamship "Queen of the Pacific," otherwise called the "Queen," etc., is in the custody of the United States marshal, under the
31 process issued in pursuance of the prayer of said libel; and whereas, the said steamship "Queen of the Pacific," otherwise called the "Queen," has been claimed by the Pacific Coast Steamship Co.; and whereas, it has been stipulated that said steamship "Queen of the Pacific," otherwise called the "Queen," may be released from arrest upon the giving and filing of an admiralty stipulation in the sum of thirty-one thousand ($31,000.00) dollars, as appears from said stipulations now on file in said court; and the parties hereto hereby consenting and agreeing that, in case of default or contumacy on the part of the claimant or their sureties, execution for the above amount may issue against their goods, chattels, and lands:

Now, therefore, the condition of this stipulation is such, that if the stipulators undersigned shall at any time, upon the interlocutory or final order or decree of the said district court, or of any appellate court to which the above-named suit may proceed, and upon notice of such order or decree to Geo. W. Towle, Jr., Esquire, proctor for the claimant of said steamship, abide by and pay the money awarded by the final decree rendered by the court or the

appellate court, if any appeal intervene, then this stipulation to be void; otherwise to remain in full force and virtue.

PACIFIC COAST S. S. CO.,
By JOHN L. HOWARD, *V. P.*
JOHN L. HOWARD.
GEO. C. PERKINS.

32 Taken and acknowledged this 26th day of May, 1892, before me—

JOHN FOUGA,
Commissioner United States Circuit Court,
Northern Dist. of California.

NORTHERN DISTRICT OF CALIFORNIA, *ss:*

George C. Perkins and John L. Howard, parties to the above stipulation, being duly sworn, depose and say, each for himself, that he is worth the sum of thirty-one thousand ($31,000.00) dollars over and above all his just debts and liabilities.

JOHN L. HOWARD.
GEO. C. PERKINS.

Sworn to this 26th day of May, 1892, before me—

JOHN FOUGA,
Commissioner United States Circuit Court,
Northern District of California.

Filed the 26th day of May, 1892.

SOUTHARD HOFFMAN, *Clerk.*

(Style of Court and Title of Cause.)

Opinion Overruling Exceptions to Libel.

Milton Andros, proctor for libelants.
Geo. W. Towle, Jr., proctor for claimant.

MORROW, *District Judge:*

The libel in this case embraces thirty-eight separate claims
33 for damages arising out of breach of contracts of affreightment, in the transportation of distinct lots of merchandise on the "Queen of the Pacific." The practice of joining a number of claims in one libel is permissible in a court of admiralty to avoid a multiplicity of suits (Lamber *v.* Rich, 12 How., 347; Sun Ins. Co. *v.* Miss. Valley Transp. Co., 14 Fed. Rep., 701).

The action is for the purpose of enforcing the claims *in rem* against the steamship which is owned by the Pacific Coast Steamship Company. The alleged breach is a failure to deliver the merchandise described in the several bills of lading or shipping receipts, and for damages for injuries to the same, claimed to have been occasioned by the negligence of the officers and crew of the vessel.

The "Queen of the Pacific," at the time the libel was filed, was

not within the northern district of California, having departed therefrom some few hours previously. The monition was consequently returned not served. An alias monition was issued and returned served, and subsequently a bond was given and the vessel released. The claimant thereupon excepted to the libel on the grounds—First, that there is no cause of action against the vessel. Second, that the cause of action, if any ever existed, is against the Pacific Coast Steamship Company. Third, that the causes of action have been waived and abandoned by virtue of a limitation clause of thirty days contained in the bill of lading or shipper's receipt. Fourth, that the demands were stale, neglected, and legally abandoned, and barred by virtue of certain statutes of limitation of this State. Fifth, that the court had no jurisdiction.

34 The objection that the vessel was not within the jurisdiction of the court when the libel was filed is immaterial. Rule 23 of the general admiralty rules prescribed by the supreme court provides that: "All libels in instance causes, civil or maritime, shall state the nature of the cause, * * * and if the libel is *in rem*, that the property is within the district." The libel in this case contains such an allegation, and, for the present purpose, it must be assumed to be true. The explanation is made that, when the libel was verified, the vessel was in the district, but the objection is based upon the fact that she departed soon after and was not in the district when the libel was filed. The vessel had, however, departed upon one of her regular voyages, and upon her return, she was duly served with process. The contracts declared on are contracts of affreightment entered into between the Pacific Coast Steamship Company and the shippers of the goods. It is a maritime contract, cognizable in the admiralty and this is sufficient. (Morewood *et al. v.* Enequist, 23 How., 492; The Belfast, 7 Wall., 642.) The court, having jurisdiction of the subject-matter, obtained jurisdiction over the *res*, when it was attached by the marshal upon the alias monition. (Taylor *v.* Carryl, 20 How., 599; Cooper *v.* Reynold, 10 Wall., 317; The Rio Grande, 23 Wall., 465.)

The first and second exceptions are substantially the same. The claimant contends that the Pacific Coast Steamship Company, and not the vessel, should have been proceeded against. In other words, he claims that these contracts of affreightment were personal engagements between the Pacific Coast Steamship Company, as the owner of the vessel, and the Bancroft-Whitney Company

35 and the other joint libelants. They were personal in so far as the Pacific Coast Steamship Company, as the owner of the "Queen of the Pacific," entered into the contracts with the libelants, but that fact does not alter the maritime nature of these contracts. They still remained contracts of affreightment, an engagement, on the one hand, to transport goods or merchandise, and, on the other, to pay for such transportation. These engagements are maritime, and shippers have a lien on the vessel for breach of contract. (The Belfast, *supra.*) They may be enforced *in personam* or *in rem*. The libelants have elected to sue *in rem*. Counsel for claimant mistakes the nature of a maritime contract, when he urges that because the

contractual relation is of an individual character, that therefore it is a personal contract, enforceable only *in personam* and not *in rem*. The mere fact that the lien originates in the personal contract between the ship-owner primarily, or by his agents for him, and the shipper does not, in my opinion, convert the contract into a personal engagement or operate as an implied waiver of a shipper's right to pursue the *rem* in a court of admiralty on a contract which otherwise is unquestionably maritime. As was said by Justice Campbell, in Taylor *et al. v.* Carryl, 20 How., 599: "The district court seems to have considered that a ship was a juridical person, having a status in the courts of admiralty, and that the admiralty was entitled to precedence whenever any question arose which authorized a judicial tribunal to call this legal entity before it. The district court, in describing the source of its authority, says of the contract of bottomry, that 'it is made with the thing, and not the owner,'
36 and that the contract of the mariners is similar; that the *res* 'represents' in that court all persons having a right and privilege, while the rights of the owner are treated there as something incorporeal, separable from the *res* and which might be seized by the sheriff, even though the *res* might be in the admiralty. This representation is not true in matter of fact, nor in point of law. Contracts with mariners for service, and other contracts of that kind, are made on behalf of owners who incur a personal responsibility; and if lenders on bottomry depend upon the vessel for payment, it is because the liability of the owner is waived in the contract itself. 'In all causes of action,' says the judge of the admiralty of Great Britain, 'which may arise during the ownership of the persons whose ship is proceeded against, I apprehend that no suit could ever be maintained against a ship, where the owners were not themselves personally liable, or where the liability had not been given up.' (The Druid, 1 Wm. Rob., 399.) And the opinion of this court in The Schooner Freeman *v.* Buckingham, 18 How., 183, was to the same effect."

In the case last cited, the court say: "We are of opinion that, under our admiralty law, contracts of affreightment, entered into with the master, in good faith, and within the scope of his apparent authority as master, bind the vessel to the merchandise for the performance of such contracts, wholly irrespective of the ownership of the vessel, and whether the master be the agent of the general or the special owner."

We come now to the exception that the action is barred by
37 the statutes of limitation of this State. It is a well-settled rule that a State statute of limitation does not apply to maritime liens. (The H. B. Foster, 3 Ware, 167; The Platina, 3 Ware, 182; The Key City, 14 Wall., 653; Henry on Admiralty Jurisdiction and Procedure, 185; Griswold *v.* The Nevada, 2 Sawy., 145; Willard *v.* Dorr, 3 Mason, 91; Brown *v.* Jones, 2 Gall., 480.) The libelants do not sue on the liens given by the State statute, but by virtue of the general maritime law. That being so, they are not affected by the limitation of time provided in section 813 of the Code of Civil Procedure, limiting the lien to the period of one year

from the time the cause of action accrued. Nor are they barred by virtue of sections 337 and 338 of the above code, the first of which prescribes a period of four years within which one may sue on a contract in writing executed in this State, and the second, which limits the time to three years, to bring an action for "injuring any goods or chattels." These limitations do not apply to maritime liens. As was said by Judge Ware in The H. B. Foster, 3 Ware, 167: "There is no statute of limitations raising a bar in the admiralty. Lapse of time, indeed, connected with circumstances, will create an equitable bar. Every man is bound to use reasonable diligence in enforcing his rights. If he does not, and in the free and rapid circulation of property, he suffers other persons to acquire an interest in the subject-matter without notice of his rights, the just penalty of such neglect may be the forfeiture of his rights, or postponement of them to the equitable claims of others. Ships, it is well known, are frequently changing owners; still more frequent are claims and rights against them for wages, repairs, and
38 supplies. All such claims ought to be enforced in due season, and indeed promptly, and not be allowed to lie as secret liens and charges, which may operate as a surprise, if not a fraud, on others. It is such considerations that have led able and learned admiralty judges to say that they will look narrowly into a lien claim of this kind if it is sought to be enforced at a later time than the termination of the voyage for which the supplies were furnished, and not because the claim then necessarily and legally becomes stale."

In the case of The Key City, 14 Wall., 653, the Supreme Court, speaking through Mr. Justice Miller, declared the law of the admiralty respecting the defense of laches or delay on the judicial enforcement of a maritime lien as follows: "We think that the following propositions as applicable to the case before us may be fairly stated as the result of these authorities:

"1. That while the courts of admiralty are not governed in such case by any statute of limitations, they adopt the principle that laches or delay in the judicial enforcement of maritime liens will, under proper circumstances, constitute a valid defense.

"2. That no arbitrary or fixed period of time has been, or will be, established as an inflexible rule, but that the delay which will defeat such a suit must in every case depend on the peculiar equitable circumstances of that case."

In other words, the deduction from the authorities is that while there is no such thing as a statute of limitation in the admiralty law, yet courts of admiralty, in the furtherance of justice,
39 will act by analogy and refuse to entertain any suit where the party seeking to enforce his claim or lien has been guilty of laches. It is in fact the equitable doctrine of laches, depending upon the circumstances of the case. What would be laches in one case might not constitute such in another. The question is one addressed to the sound discretion of the court, depending upon all the facts of the particular case. It is, therefore, a question of evi-

dence, to be determined hereafter upon the facts as they may appear.

The counsel for claimant further contends that the libels should have counted on a tort and not on a contract. The libelants had the election to sue upon contract or tort. They could stand upon the contracts of affreightment, or they might waive their right to sue on the contracts, and sue in tort. Counsel for claimant's contention that, as the libelants are suing for damages to the merchandise described in the bills of lading or shipping receipts, alleged to have been occasioned by the negligence of the officers and crew of the "Queen of the Pacific," the cause of action is tort, and not contract, is not well founded. It is well settled by adjudications that one may recover, on a contract of affreightment, for damages accruing from the negligent handling of goods in the course of transportation, or from other negligence. "Shippers have a lien by the maritime law upon the vessel employed in the transportation of their goods and merchandise from one port to another, as a security for the fulfillment of the contract of the carrier, that he will safely keep, duly transport, and rightly deliver the goods and merchandise shipped on board, as stipulated in the bill of lading or other contract of shipment." (The Belfast, *supra.*)

40 In The A. M. Bliss, 2 Lowell, 103 (1 Fed. Cas., 593), Judge Lowell says: "The district court has full jurisdiction of contract of affreightment, whether evidenced by charter-party or bill of lading; and though the damages may, in any case, be somewhat indirect, as, for instance, if they arise out of a jettison which required contribution, or out of a fraudulent payment of salvage by the master, yet the mode in which the claim for compensation arises will not oust the jurisdiction." In the case of The M. Vandercook, 24 Fed. Rep., 472, decided by Judge Nixon, and quoted by counsel for claimant to the point that this suit should be an action *ex delicto* and not *ex contractu*, the learned judge had to deal with a contract of towage, and not of affreightment, where a different principle has been held to apply. But Judge Benedict, in The Samuel J. Christian, 16 Fed. Rep., 796, held that one might sue on a contract of towage for negligence of the tug in towing the vessel. This was likewise held by Judge Brown in The Grapeshot, 22 Fed. Rep., 382. Judge Brown says: "By the law of both countries (America and England) negligence in a common carrier is a tort, as well as a breach of contract."

The last objection is based upon the following clause in the shipping receipts: "It is expressly agreed that all claims against the P. C. S. S. Co., or any of the stockholders of said company, for damages to or loss of any of the within merchandise, must be presented to the company within thirty days from the date hereof; and that after thirty days from the date hereof, no action, suit or proceeding, in any court of justice, shall be brought against said P. C.

41 S. S. Co., or any of the stockholders thereof, for any damage to or loss of said merchandise, and the lapse of said thirty days shall be deemed a conclusive bar and release of all right to recover against said company, or any of the stockholders thereof,

for any such damage or loss." The libelants did not present their claims for damage or loss to the company within thirty days from the date of the bills of lading or shipping receipts, nor was this action brought within that time. Counsel for libelants contends that this stipulation is limited to personal actions against the Pacific Coast Steamship Company and its stockholders, and does not apply to an action against the vessel—to a suit *in rem*. The strict letter of this clause certainly justifies such a construction of its terms. That a stipulation of this character should be strictly construed against the party for whose benefit it accrues is well established by the authorities. Mr. Chief Justice Gibson, in Atwood *v.* Reliance Transp. Co., 9 Watts, 88 (34 Am. Dec., 503), in relation to a restriction in a contract limiting the liability of a carrier, said: "Though it is perhaps too late to say that a carrier may not accept his charge in special terms, it is not too late to say that the policy which dictated the rule of the common law requires that exceptions to it be strictly interpreted, and that it is his duty to bring his case strictly within them." In New Jersey Steam Navigation Co. *v.* Merchants' Bank, 6 How., 383, Judge Nelson thus states the law: "The special agreement, in this case, under which the goods were shipped, provided that they should be conveyed at the risk of Harnden; and that the respondents were not to be accountable to him or to his employers, in any event, for loss or damage."

42 "The language is general and broad, and might very well comprehend every description of risk incident to the shipment, but we think it would be going farther than the intent of the parties, upon any fair and reasonable construction of the agreement, were we to regard it as stipulating for willful misconduct, gross negligence, or want of ordinary care, either in the seaworthiness of the vessel, her proper equipments and furniture, or in her management by the master and hands. * * * If it is competent at all for the carrier to stipulate for the gross negligence of himself and his servants or agents in the transportation of the goods, it should be required to be done, at least, in terms that leave no doubt as to the meaning of the parties."

In the case of Airey *et al. v.* Merrill, 2 Curt., 8 (1 Fed. Cas., 250), Mr. Justice Curtis said: "The rule of construction as to exceptions is, that they are to be taken most strongly against the party for whose benefit they are introduced. * * * These words of exception being introduced by the covenantor for his own benefit, if they are capable of bearing a more or less extended meaning, the rule requires that meaning to be allowed to them which is least beneficial to the covenantor."

In Hooper *v.* Wells, Fargo & Co., 27 Cal., 11 (Am. Dec., 211), Judge Sawyer used the following language: "What is the extent of the restriction upon the common-law liabilities of the defendants? The language must be taken most strongly against the defendants: Edwards on Bailments, 492. The instrument is executed by them alone. It was drawn up with care, in language selected by

43 themselves, the blank form having been printed in advance ready to be presented to all persons offering property for

transportation by their express. The restrictions were for their benefit. The owners of packages sent by express rarely examine with care, or indeed have an opportunity to critically consider the terms of the receipt presented by them; and general terms, under such circumstances, are apt to mislead. These are some of the reasons given in the books. * * * To justify the conclusion that such exemption is contemplated, the language should be unequivocal, and susceptible of no other reasonable interpretation."

In the above case, the language used by Judge Sanderson, who dissented from the opinion of the court on other points, is as follows: "The instrument was prepared by the defendants without previous consultation with the plaintiff, who had therefore no choice in the selection of the terms employed. And it is well settled that the language creating the exceptions from liability in such cases must be strictly construed against the party in whose favor they are made. The language was introduced by the defendants for their benefit, and if it is susceptible of a more or less extended meaning, the rule of construction in such cases is to adopt that which is the least favorable to the party who is to be benefited thereby."

In Levering *v.* Union Transportation and Ins. Co., 42 Mo., 88 (97 Am. Dec., 320), Judge Wagner, speaking of a stipulation limiting the carrier's liability, said: "As the exception is an innovation on the principles of law, and introduced exclusively for the benefit of the carrier, the construction must be made most strongly against him."

The inequality upon which the parties stand, with respect to stipulations limiting the carrier's liability, is forcibly stated by Mr. Justice Gray in the case of Liverpool Steam Co. *v.* Phenix Ins. Co., 129 U. S., 441, which is as follows: "The carrier and his customer do not stand upon a footing of equality. The individual customer has no real freedom of choice. He cannot afford to higgle or stand out, and seek redress in the courts. He prefers rather to accept any bill of lading, or to sign any paper, that the carrier presents; and in most cases he has no alternative but to do this, or to abandon his business."

Subjecting the stipulation in the contracts of affreightment in this case to a strict construction, and it is evident that it, in terms, applies only to the Pacific Coast Steamship Company and to its stockholders. The vessel is not mentioned in this stipulation, and the court cannot import this qualification into the contracts as one contemplated by both parties.

But even if the stipulation should be deemed to apply to the vessel, the period of thirty days from the date of the contract appears unreasonable. The provision is not thirty days from the time of the loss or damage, but thirty days from the date of the contract. In the case of Pacific Exp. Co. *v.* Darnell, 6 S. W. Rep., 765, it was held that 60 days from the date of the contract was unreasonable. The court say: "Any reasonable limitation contained in the bill of lading would be upheld by the court. But it has been decided by this court that an unreasonable restriction is not

valid, even in cases to which our statute does not apply.
45 (Railroad Co. *v.* Harris, 67 Tex., 166, 2 S. W. Rep., 374.) Is this a reasonable limitation? We think not. If it had been stipulated that a claim should be made in 60 days from the ascertainment of the loss, the case would have been different. But to require a shipper to give notice of his claim within a short period of the date of the bill of lading, without reference to the time when a loss for the breach of the contract accrued, is to impose a restriction which in many cases would deny a right of action, and thereby permit the carrier to contract against his negligence which is never allowed."

In the case of Adams Express Company *v.* Reagan, 29 Indiana, 21 (92 Am. Dec., 332), a period of thirty days was held to be unreasonable, under the circumstances of that case, and void as against public policy.

The limitation of 30 days provided in the contract under consideration appears to be unreasonable. The vessel might be detained at sea by storms or accident, and the shipper would be debarred from presenting any claim, by the lapse of the thirty days, or have but a short time in which to ascertain his loss or damage and present his claims for the same to the company. Contingencies might arise, which would render a period of that duration, beginning to run from the date of the inception of the contract, useless and which would practically deprive the shipper of any opportunity for redress.

It follows, from these considerations, that the exceptions should be overruled, and it is so ordered.

(Endorsed:) Filed April 17th, 1894. Southard Hoffman, clerk, by J. S. Manley, deputy clerk.

46 (Style of Court and Title of Cause.)

Decree Overruling Exceptions.

This cause coming on to be heard on the exceptions filed by the claimant to the libel herein, and the advocates of the respective parties having been heard, and due deliberation being had in the premises:

It is now ordered, adjudged, and decreed that said exceptions, and each and every one of them, to the libel aforesaid, be and the same hereby are disallowed and overruled.

WM. W. MORROW, *Judge.*

(Endorsed:) Filed August 27th, 1894, *nunc pro tunc* as of July 2, 1894, by order of court. Southard Hoffman, clerk, by J. S. Manley, deputy clerk. Entered in Book 3, Judgments and Decrees, page 243.

47 UNITED STATES OF AMERICA:

District Court of the United States for the Northern District of California. In Admiralty.

THE BANCROFT-WHITNEY COMPANY and Others, Joint Libelants,
vs.
THE STEAMSHIP "QUEEN OF THE PACIFIC," etc., Otherwise Called the "Queen," etc., Respondent.

Answers of the Pacific Coast Steamship Company.

To the Honorable Wm. W. Morrow, judge of the district court of the United States for the northern district of California:

The answer of the Pacific Coast Steamship Company, claimant of the steamship "Queen," etc., to the joint libels of Bancroft-Whitney Company, a corporation, and others, on file in above-entitled proceedings, respectfully shows: That the Pacific Coast Steamship Company is a corporation organized and existing under and by virtue of the laws of the State of California, and that its office and principal place of business is at the city and county of San Francisco, said State.

48 Alleges that the several contracts referred to in said libels, and each thereof, was and were signed by or on behalf of the owner or owners of the merchandise mentioned or referred to therein; and that the several copies of said contracts attached to said libels are and each of them is, copies and copy of the terms of said contracts only; the signature by, or for, the said owner or owners of said merchandise not being in the contracts attached to said libels set forth. That where references are hereinafter made to such contracts, such references—admissions or allegations—relate to the terms thereof set forth, as a true copy of such terms, but are not, and is not, an allegation or an admission that said contracts, or any of the same, were not signed by or on behalf of the owner or owners of the merchandise referred to therein.

And answering unto the said libel of Bancroft-Whitney Company:

Answer to Libel of Bancroft-Whitney Company.

I.

Admits that libelant is a corporation.

II.

Denies that on or about the 28th day of April, 1888, or at any time, at the port of San Francisco, in the State of California, or elsewhere, libelant shipped in good order and condition, or otherwise, or at all, one case of books on the steamship "Queen of the Pacific," then and there belonging to or employed by the Pacific Coast Steamship Company, a corporation, or otherwise employed, to

be in and by said steamship transported to the port or place
49 of San Diego, in said State, or elsewhere, and there, or elsewhere to be delivered in like good order and condition as when received, or otherwise, or at all, unto Bancroft-Whitney Company, and denies that the said Pacific Coast Steamship Company, when it received said goods, or any thereof, on board the said steamship for transportation as aforesaid, entered into a contract of affreightment in writing with this libelant, wherein it acknowledged to have received said goods in apparent good order, or otherwise, and then and there promised and agreed to transport said goods to said port of San Diego, or elsewhere, and there deliver them unto Bancroft-Whitney Company, in like good order as when received, certain perils in said agreement mentioned excepted, or otherwise; and denies that the said steamship company received said merchandise, or books, on board of said steamship, but the contrary; and in that behalf alleges, that the one case of books referred to in said libel, was delivered to the Pacific Coast Steamship Company by said Bancroft-Whitney Company at said San Francisco, to be by said steamship company forwarded to said San Diego, the same to be so forwarded at the option of said steamship company upon said steamship "Queen of the Pacific," or upon any other steamship which said steamship company should choose or employ for such purpose, and such delivery was made to said steamship company under a certain special contract and agreement in writing relating thereto, made and entered into prior to such delivery, and on, to wit, the 28th day of April, 1888, by and between said Bancroft-Whitney Company and said steamship company; which said agree-
50 ment is referred to in said libel, and a copy thereof attached thereto, and made a part thereof.

III.

Admits that said steamship thereafter sailed from the port of San Francisco, bound to said port of San Diego, with said merchandise on board thereof; admits that the same was not delivered at said San Diego; admits that the same was returned to said San Francisco; admits that the same was damaged by reason of having been wet with sea water, but denies that the same was so wet with sea water during said voyage or by reason of the negligence of said steamship company, its officers and servants, or either of them, and denies that by reason of such, or any such negligence, sea water, or any water, gained access to the interior of said ship where said merchandise was stowed on or about the 30th day of April, 1888, or at any time, or date, or at all.

IV.

Denies that at the time said libel was filed said steamship was in the northern district of California; and in that behalf alleges that when said libel was filed said steamship was, and for four (4) days and upwards continuously thereafter she, said steamship, remained without the said northern district of California.

V.

Denies that in consequence of the alleged injury and damages to said merchandise by sea water as in said libel, article V
51 thereof, or elsewhere therein, alleged, libelants have sustained damages in the sum of two hundred and ten (210) dollars, or in any other sum, or at all.

VI.

Denies that all and singular, or any, the premises in said libel alleged are true, save as in this answer specifically admitted, and denies that the same, or any thereof were, when said libel was filed in the above-entitled court, within the admiralty and maritime, or the admiralty or the maritime, jurisdiction of this honorable court.

VII.

Alleges that the said contract, a copy of which is attached to said libel, is a contract between libelant and the said Pacific Coast Steamship Company individually, and not with said company as agents for the steamship "Queen of the Pacific," or the steamship "Queen," and further, that the said contract was entered into in the State of California by persons then resident therein, and that said contract was to be performed in said State; and that the damage to such merchandise, if any, occurred in said State.

VIII.

Alleges that at and during all the times in said libel referred to, the said Pacific Coast Steamship Company was the owner of the said steamship "Queen of the Pacific." That said company was then engaged in the carriage of passengers and merchandise, by water, under and pursuant to special contracts relating to such carriage, and that, during said times it employed and used the
52 said steamship "Queen of the Pacific," and numerous other steamers and vessels, in performing its obligations under such special contracts, and that the merchandise referred to in said libel was placed upon said steamship by said steamship company for carriage to its destination pursuant to its said contract with said Bancroft-Whitney Company, not because such, or any, contract required that it should be so placed and so carried, but because it suited the then convenience of said steamship company and its business that the same should be so placed and so carried.

And as a further and separate answer and defense the Pacific Coast Steamship Company, claimant, alleges:

I.

That said steamship "Queen of the Pacific" was, when she sailed from said port of San Francisco, as in said libel alleged, stout, staunch, strong, and in every respect seaworthy, and in such condition sailed from said port of San Francisco fully and completely manned, officered, and equipped for her then intended voyage, and

with merchandise on freight, and a large number, to wit, one hundred and twenty-two (122) persons, men, women, and children, passengers on board of her. That she left Broadway wharf No. — at said San Francisco at about the hour of 2 o'clock p. m. of April 29th, 1888, and proceeded down the bay out through the Golden Gate across the bar, and on her course in a southerly direction with a fresh northwest wind blowing and a northwest chop sea. That no unusual incident was known to occur during said 29th day of April, 1888. That about one
53 o'clock a. m. of the 30th day of April, said steamship was noticed to have a slight list to starboard; that efforts were then made to correct such list by shifting freight to port in the between-decks, and burning coal mostly from the starboard bunkers. That about 2.15 or 2.30 o'clock a. m. of Monday, April 30, 1888, water was discovered to be dropping from a point in the iron bulkhead on the starboard side of the engine-room, and about six (6) or eight (8) inches above the deck of the alleyway in the between-decks of the vessel; that examination then made resulted in water being found in the between-decks of the steamship aft, such water extending about half way from the side of the ship to the hatch coamings, but the aperture through which such water entered the vessel could not, after diligent search for the same, be discovered; that seamen were put to work passing such water down the hatches into the hold so as to bring it within reach of the bilge pumps, and such pumps were kept in operation, notwithstanding which the water steadily increased between-decks, and the list of the vessel became so great that about the hour of 5 o'clock a. m. it was deemed by the master of said vessel prudent to make for Port Harford with all convenient speed, which was done, and the said vessel at about the hour of seven o'clock a. m. of said 30th day of April, 1888, was run upon the beach at said Port Harford, at which place sea water immediately came in over her deck, and nearly filled the vessel with water, and thereby said merchandise became wet with sea water. That the beaching of said steamship was necessary to prevent and avoid a total loss of said steamship and of all the said merchandise
54 then on board of her, and was done by the master thereof as the result of cool deliberation, and in the exercise of a wise discretion on his part as to what was best to be done, and with the purpose of saving said vessel and cargo and of rendering entirely safe the lives of all the persons, passengers, and crew, two hundred and twelve (212) in number, then on board of said steamship.

II.

That the said Pacific Coast Steamship Company, owner of said steamship, did at all times, and immediately prior to the sailing of said steamship from the said port of San Francisco with such merchandise on board of her, exercise due diligence to make the said steamship in all respects seaworthy and properly manned, equipped, and supplied for her then intended voyage, to wit, a voyage to San Diego and way ports, and return. That the crew of said steamship was composed during the times referred to of persons competent to

discharge the duties pertaining to their several stations on board said vessel.

III.

That said one case of books, merchandise, has heretofore all been delivered by the Pacific Coast Steamship Company at said port of San Francisco.

IV.

That said merchandise was delivered to the Pacific Coast Steamship Company, and was received, carried, and so delivered by it under and in pursuance of the laws of the State of California,
55 and the provisions of a special contract theretofore made by or for said libelant, and the said steamship company, a copy of which said contract is attached to said libel, and made a part thereof; and that said merchandise was damaged, if at all, in said State.

And for a further and separate defense to the cause and causes of action in said libel alleged, claimant alleges:

That the same are, and each of them is, barred by the laches of libelant in the prosecution of the same; and in that behalf specifies the following:

(*a.*) That the same are, and each thereof is, barred by the terms of the contract alleged in said libel, and dated on, to wit, the 28th day of April, 1898, that is to say: the portions thereof in the words and figures following:

"It is expressly agreed that all claims against the P. C. S. S. Co., or any of the stockholders of said company, for damage to or loss of any of the within merchandise, must be presented to the company within thirty days from date hereof; and that after thirty days from date hereof, no action, suit, or proceeding, in any court of justice, shall be brought against said P. C. S. S. Co., or any of the stockholders thereof, for any damage to or loss of said merchandise; and the lapse of said thirty days shall be deemed a conclusive bar and release of all right to recover against said company, or any of the stockholders thereof, for any such damage or loss," the fact being, and the Pacific Coast Steamship Company, claimant, so alleges, that libelant did not present or cause to be presented to said company within thirty (30) days, this, its, or their claim for the damages, or any part thereof, in said libel alleged, nor was
56 this, or any, proceeding commenced in any court, within said thirty (30) days; nor at any time prior to the 28th day of April, 1892, at which time said steamship was not within the northern district of California; nor was said steamship seized by the marshal under process issued in this proceeding, until the 4th day of May, 1892. That the said merchandise became wet with sea water, as herein alleged, on, to wit, the 30th day of April, 1888, and such fact was, as claimant is informed and believes and alleges, known to libelant on, or prior to, the 1st day of May, 1888.

(*b.*) That the same is, and are, barred by the provisions of section 337 of the Code of Civil Procedure of the State of California.

(c.) That the same is, and are, barred by the provisions of section 338 of the Code of Civil Procedure of the State of California.

(d.) That the same is, and are, barred by such laches on the part of libelant, delay in the prosecution of the same for such length of time, as constitutes, and is, a bar to a recovery thereof in a court of admiralty.

Wherefore, claimant prays that libelant take nothing in above-entitled cause; that said libel be dismissed, and that claimant recover his costs and charges herein incurred, with such other relief as may be just.

GEO. W. TOWLE, JR.,
Proctor for Claimant.

And answering unto the further, separate, and second cause of action of said The Bancroft-Whitney Company:

57 I.

Denies that on or about the 27th day of April, 1888, or at any time, at the port of San Francisco, in the State of California, or elsewhere, libelant shipped in good order and condition, or otherwise, or at all, the merchandise mentioned in said libel, or any thereof, on the steamship "Queen of the Pacific," then and there belonging to or employed by the Pacific Coast Steamship Company, a corporation, or otherwise employed, to be in and by said steamship transported to the port or place of San Diego, in said State, or elsewhere, and there, or elsewhere, to be delivered in like good order and condition as when received, or otherwise, or at all, unto Victor E. Shaw, and denies that the said Pacific Coast Steamship Company, when it received said goods, or any thereof, on board the said steamship for transportation as aforesaid, entered into a contract of affreightment in writing with this libelant, wherein it acknowledged to have received said goods in apparent good order, or otherwise, and then and there promised and agreed to transport said goods to said port of San Diego, or elsewhere, and there deliver them unto Victor E. Shaw, in like good order as when received, certain perils in said agreement mentioned excepted, or otherwise; and denies that the said steamship company received said merchandise, on board of said steamship, but the contrary; and in that behalf alleges, that the merchandise referred to in said libel, was delivered, or caused to be delivered, to the Pacific Coast Steamship Company, by the owner thereof, at San Francisco, to be by said steamship company forwarded to said San Diego, the same to be so
58 forwarded at the option of said steamship company, upon said steamship "Queen of the Pacific," or upon any other steamship which said steamship company should choose, or employ, for such purpose, and such delivery was made to said steamship company under a certain special contract, and agreement in writing, relating thereto, made and entered into prior to such delivery, and on, to wit, the 27th day of April, 1888, by and between said owner of said merchandise and said steamship company; which said

agreement is referred to in said libel, and a copy thereof attached thereto, and made a part thereof.

II.

Admits that said steamship thereafter sailed from the port of San Francisco, bound to said port of San Diego with the merchandise mentioned in said contract on board thereof; admits that the same was not delivered at said San Diego; admits that the same was returned to San Francisco; admits that the same was damaged by reason of having been wet with sea water, but, denies that the same was so wet with sea water during said voyage or by reason of the negligence of said steamship company, its officers and servants, or either of them, and denies that by reason of such, or any such, negligence, sea water, or any water, gained access to the interior of said ship where said merchandise was stowed, on or about the 30th day of April, 1888, or at any other time, or date, or at all.

III.

Denies that at the time said libel was filed said steamship
59 was in the northern district of California; and in that behalf alleges, that when said libel was filed said steamship was, and for four (4) days and upwards continuously thereafter she, said steamship, remained without the said northern district of California.

IV.

Denies that in consequence of the alleged injury and damage to said merchandise by sea water as in said libel article V thereof, or elsewhere therein, alleged, libelants have sustained damages in the sum of four hundred and fifty-five dollars, or in any other sum, or at all.

V.

Denies that all and singular, or any, the premises, in said libel alleged, are true, save as in this answer specifically admitted, and denies that the same, or any thereof were, when said libel was filed in the above-entitled court, within the admiralty and maritime, or the admiralty or the maritime, jurisdiction of this honorable court.

VI.

Alleges that the said contract, a copy of which is attached to said libel, is a contract between the owner of said merchandise and said Pacific Coast Steamship Company individually, and not with said company as agents for the steamship "Queen of the Pacific," or the steamship "Queen;" and further, that the said contract was entered into in the State of California, by persons then resident therein, and that said contract was to be performed in said State, and that the damage to such merchandise, if any, occurred in said State.

60 VII.

Alleges that, at and during all the times in said libel referred to, the said Pacific Coast Steamship Company was the owner of the

said steamship "Queen of the Pacific." That said company was then engaged in the carriage of passengers and merchandise, by water, under and pursuant to special contracts relating to such carriage, made in the State of California, and that during said times it employed, and used, the said steamship "Queen of the Pacific" and numerous other steamers and vessels in performing its obligations under such special contracts, and that the merchandise referred to in said libel was placed upon said steamship, by said steamship company, for carriage to its destination pursuant to its said contract with said owners thereof, so made, not because such, or any, contract required that it should be so placed and so carried, but because it suited the then convenience of said steamship company and its business that the same should be so placed and so carried.

And as a further and separate answer and defense, the Pacific Coast Steamship Company, claimant, alleges:

I.

That said steamship "Queen of the Pacific" was, when she sailed from said port of San Francisco, as in said libel alleged, stout, staunch, strong, and in every respect seaworthy, and in such condition sailed from said port of San Francisco fully and completely manned, officered and equipped for her then intended voyage, and with merchandise on freight, and a large number, to wit, one
61 hundred and twenty-two (122) persons, men, women, and children passengers, on board of her. That she left Broadway wharf No. —, at said San Francisco, at about the hour of two o'clock p. m. of April 29, 1888, and proceeded down the bay, out through the Golden Gate, across the bar and on her course in a southerly direction, with a fresh northwest wind blowing and a northwest chop sea. That no unusual incident was known to occur during said 29th day of April, 1888. That about 1 o'clock a. m. of the 30th day of April, said steamship was noticed to have a slight list to starboard; that efforts were then made to correct such list by shifting freight to port in the between-decks, and burning coal mostly from the starboard bunkers. That about 2.15 or 2.30 o'clock a. m. of Monday, April 30, 1888, water was discovered to be dropping from a point in the iron bulkhead on the starboard side of the engine-room, and about six (6) or eight (8) inches above the deck of the alleyway in the between-decks of the vessel; that examination then made resulted in water being found in the between-decks of the steamship aft, such water extending about half way from the side of the ship to the hatch coamings, but the aperture through which such water entered the vessel could not, after diligent search for the same, be discovered; that seamen were put to work passing such water down the hatches into the hold so as to bring it within reach of the bilge pumps, and such pumps were kept in operation, notwithstanding which the water steadily increased between-decks, and the list of the vessel became so great that at about the hour of
5 o'clock a. m. it was deemed by the master of said vessel
62 prudent to make for Port Harford with all convenient speed, which was done, and the said vessel, at about the hour of

seven o'clock a. m of said 30th day of April, 1888, was run upon the beach at said Port Harford, at which place sea water immediately came in over her deck, and nearly filled the vessel with water, and thereby said merchandise became wet with sea water. That the beaching of said steamship was necessary to prevent, and avoid, a total loss of said steamship and of all the said merchandise then on board of her, and was done by the master thereof as the result of cool deliberation, and in the exercise of a wise discretion on his part as to what was best to be done, and with the purpose of saving said vessel and cargo and of rendering entirely safe the lives of all the persons, passengers and crew, two hundred and twelve (212) in number, then on board of said steamship.

II.

That the said Pacific Coast Steamship Company, owner of said steamship, did at all times, and immediately prior to the sailing of said steamship from the said port of San Francisco with such merchandise on board of her, exercise due diligence to make the said steamship in all respects seaworthy and properly manned, equipped, and supplied for her then intended voyage, to wit, a voyage to San Diego, and certain way ports and return. That the crew of said steamship was composed during the times referred to, of persons competent to discharge the duties pertaining to their several stations on board of said vessel.

63

III.

That said merchandise has heretofore all been delivered by the Pacific Coast Steamship Company, at said port of San Francisco.

IV.

That said merchandise was delivered to the Pacific Coast Steamship Company, and was received, carried, and so delivered by it under and in pursuance of the laws of the State of California, and the provisions of a special contract theretofore made by, or for the owner of said merchandise with the said steamship company, in said State, a copy of which contract is attached to said libel, and made a part thereof; and that said merchandise was damaged, if at all, in said State.

And for a further and separate defense to the cause and causes of action in said libel alleged, claimant alleges:

That the same are, and each of them is, barred by the laches of libelant in the prosecution of the same; and in that behalf specifies the following:

(a.) That the same are, and each thereof is, barred by the terms of the contract alleged in said libel, and dated on, to wit, the 27th day of April, 1888, that is to say, the portions thereof in the words and figures following: "It is expressly agreed that all claims against the P. C. S. S. Co., or any of the stockholders of said company, for damage to or loss of any of the within merchandise, must be pre-

sented to the company within thirty days from date hereof;
64 and that after thirty days from date hereof, no action, suit, or proceeding, in any court of justice, shall be brought against said P. C. S. S. Co., or any of the stockholders thereof, for any damages to or loss of said merchandise; and the lapse of said thirty days shall be deemed a conclusive bar and release of all right to recover against said company, or any of the stockholders thereof, for any such damage or loss," the fact being, and the Pacific Coast Steamship Company, claimant, so alleges, that libelant did not present or cause to be presented to said company within such thirty (30) days his, its, or their, claim for the damages, or of any part thereof, in said libel alleged, nor was this, or any proceeding commenced in any court, within said thirty (30) days; nor at any time prior to the 28th day of April, 1892, at which time said steamship was not within the northern district of California; nor was said steamship seized by the marshal under process issued in this proceeding, until the 4th day of May, 1892. That the said merchandise became wet with sea water, as herein alleged, on, to wit, the 30th day of April, 1888, and such fact was, as claimant is informed and believes and alleges, known to libelant, on or prior to the 1st day of May, 1888.

(*b.*) That the same is, and are, barred by the provisions of section 337 of the Code of Civil Procedure of the State of California.

(*c.*) That the same is, and are, barred by the provisions of section 338 of the Code of Civil Procedure of the State of California.

65 (*d.*) That the same is, and are, barred by the provisions of section 813 of the Code of Civil Procedure of the State of California.

(*e.*) That the same is, and are, barred by such laches on the part of libelant, delay in the prosecution of his suit for such length of time, as constituted, and is a bar to a recovery thereof in a court of admiralty. And further, that by reason of the delay of libelant in commencing such suit, claimant is, and will be, deprived of the testimony of certain persons, members of the crew of said steamship "Queen of the Pacific" at the times referred to in said libel, which persons were and are the only persons who were specially conversant with the condition of certain dead-lights and a certain dead-light of said steamer, at the time said steamship sailed on said voyage; and each of such persons knew that the said dead-lights were, and that each of the same was closed and well fastened, and particularly that the after dead-light in the starboard alleyway of said steamer was so closed and well fastened, prior to, and at the time, said steamship sailed on said voyage, and would so testify; and claimant believes, and alleges, that their testimony would establish such fact, to the satisfaction of this court, could such persons be produced as witnesses upon the trial of this action; that the names of such persons, whose evidence claimant is informed and believes and alleges is, and will be, so lost, to claimant, by virtue of the said laches and delay of libelant, are: J. W. Ingraham, who was third officer of said steamship, during the times referred to; Frank Esmelts, who was, during such time, captain of the hold; and Olai Johnson, who was

a seaman; each and all of whom could and would have been
66 produced, as witnesses for claimant, upon the trial of said suit, had the same been commenced within a reasonable time, to wit, the time limited by the laws of the State of California for the prosecution of the same.

Wherefore, claimant prays that libelant take nothing in above-entitled cause; that said libel be dismissed, and that claimant recover its costs and charges herein incurred, with such other relief as may be just.

GEO. W. TOWLE, JR.,
Proctor for Claimant.

(Endorsed:) Filed July 3d, 1894. Southard Hoffman, clerk, by J. S. Manley, deputy clerk.

Answer to Libel of Hellman, Haas & Co.

And answering unto the said libel of A. Haas, J. Baruch and H. W. Hellman:

I.

Alleges that The Pacific Coast Steamship Company, claimant, its agents and servants, has and have no knowledge, information, or belief sufficient to enable it or them to answer the matters alleged in article I of said libel, and, therefore, placing its denials upon such ground, denies that said libelants, A. Haas, J. Baruch, and H. W. Hellman, were at all, or any, the times in said libel mentioned, partners doing business under the firm name and style of Hellman, Haas & Co., or otherwise, and on like grounds, denies that on or about the — day of April, A. D. 1888,
67 Farnsworth & Ruggles, or any one, shipped in good order and condition, or otherwise, the merchandise mentioned in said libel, or any thereof, on the steamship "Queen of the Pacific." And further, upon its information and belief, alleges that said alleged partnership had not, prior to the time this proceeding was commenced, filed with the clerk of the county in which its principal place of business is situated, a certificate stating the names in full of all the members of such partnership and their place of residence, and published such certificate, or caused the same to be published once a week for four successive weeks in a newspaper published in such county, or in a newspaper published in any county adjoining such county.

II.

Denies that on or about the — day of April, 1888, or at any time, at the port of San Francisco, in the State of California, or elsewhere, Farnsworth & Ruggles, or any one, shipped in good order and condition, or otherwise, or at all, the merchandise mentioned in said libel, or any thereof, on the steamship "Queen of the Pacific," then and there belonging to or employed by the Pacific Coast Steamship Company, a corporation, or otherwise employed, to be in and by

said steamship transported to the port or place of San Pedro, in said State, or elsewhere, and there, or elsewhere, to be delivered in like good order and condition as when received, or otherwise, or at all, unto Hellman, Haas & Co., and denies that the said Pacific Coast Steamship Company, when it received said goods, or any thereof, on board the said steamship for transportation as aforesaid,
68 entered into a contract of affreightment in writing with this libelant, wherein it acknowledged to have received said goods in apparent good order, or otherwise, and then and there promised and agreed to transport said goods to said port of San Pedro, or elsewhere, and there deliver them unto Hellman, Haas & Co., in like good order as when received, certain perils in said agreement mentioned excepted, or otherwise; and denies that the said steamship company received said merchandise, on board of said steamship, but the contrary; and in that behalf, alleges that the merchandise referred to in said libel, was delivered, or caused to be delivered, to the Pacific Coast Steamship Company, by the owner thereof, at San Francisco, to be by said steamship company forwarded to said San Pedro, the same to be so forwarded at the option of said steamship company, upon said steamship "Queen of the Pacific," or upon any other steamship which said steamship company should choose, or employ, for such purpose, and such delivery was made to said steamship company under a certain special contract and agreement in writing, relating thereto, made and entered into prior to such delivery, and on, to wit, the — day of April, 1888, by and between said owner of said merchandise and said steamship company; which said agreement is referred to in said libel, and a copy thereof attached thereto, and made a part thereof.

III.

Admits that said steamship thereafter sailed from the port of San Francisco, bound to said port of San Pedro, with the merchandise mentioned in said contract on board thereof; admits that the
69 same was not delivered at said San Pedro; admits that the same was returned to said San Francisco; admits that the same was damaged by reason of having been wet with sea water, but denies that the same was so wet with sea water during said voyage or by reason of the negligence of said steamship company, its officers and servants, or either of them, and denies that by reason of such, or any such, negligence, sea water, or any water, gained access to the interior of said ship where said merchandise was stored, on or about the 30th day of April, 1888, or at any other time, or date, or at all.

IV.

Denies that at the time said libel was filed said steamship was in the northern district of California; and in that behalf alleges, that when said libel was filed said steamship was, and for four (4) days and upwards continuously thereafter she, said steamship, remained without the said northern district of California.

V.

Denies that in consequence of the alleged injury and damage to said merchandise by sea water as in said libel, article V. thereof, or elsewhere therein, alleged, libelants have sustained damage in the sum of eight thousand, nine hundred and fifty-two $\frac{1}{100}$ dollars, or in any other sum, or at all.

VI.

Denies that all and singular, or any, the premises, in said libel alleged, are true, save as in this answer specifically admitted, and denies that the same, or any thereof were, when said libel
70 was filed in the above-entitled court, within the admiralty and maritime, or the admiralty or the maritime, jurisdiction of this honorable court.

VII.

Alleges that the said contract, a copy of which is attached to said libel, is a contract between the owner of said merchandise and the said Pacific Coast Steamship Company individually, and not with said company as agents for the steamship "Queen of the Pacific," or the steamship "Queen;" and further, that the said contract was entered into in the State of California, by persons then residents therein, and that said contract was to be performed in said State, and that the damage to such merchandise, if any, occurred in said State.

VIII.

Alleges that at and during all the times in said libel referred to, the said Pacific Coast Steamship Company was the owner of the said steamship "Queen of the Pacific." That said company was then engaged in the carriage of passengers and merchandise, by water, under and pursuant to special contracts relating to such carriage, made in the State of California, and that during said times it employed, and used, the said steamship "Queen of the Pacific" and numerous other steamers and vessels in performing its obligations under such special contracts, and that the merchandise referred to in said libel was placed upon said steamship, by said steamship company for carriage to its destination pursuant to its said contract with said owners thereof, so made, not because such, or any, contract required that it should be so placed and so carried,
71 but because it suited the then convenience of said steamship company and its business that the same should be so placed and so carried.

And as a further and separate answer and defense, the Pacific Coast Steamship Company, claimant, alleges:

I.

That said steamship "Queen of the Pacific" was, when she sailed from said port of San Francisco, as in said libel alleged, stout, staunch, strong, and in every respect seaworthy, and in such con-

dition sailed from said port of San Francisco fully and completely manned, officered and equipped for her then intended voyage, and with merchandise on freight, and a large number, to wit, one hundred and twenty-two (122) persons, men, women, and children, passengers, on board of her. That she left Broadway wharf No. —, at said San Francisco, at about the hour of two o'clock p. m. of April 29, 1888, and proceeded down the bay, out through the Golden Gate, across the bar and on her course in a southerly direction, with a fresh northwest wind blowing and a northwest chop sea. That no unusual incident was known to occur during said 29th day of April, 1888. That about one o'clock a. m. of the 30th day of April, said steamship was noticed to have a slight list to starboard; that efforts were then made to correct such list by shifting freight to port in the between-decks, and burning coal mostly from the starboard bunkers. That about 2.15 or 2.30 o'clock a. m. of Monday, April 30, 1888, water was discovered to be dropping from a point
72 in the iron bulkhead on the starboard side of the engine-room, and about six (6) or eight (8) inches from the deck of the alleyway in the between-decks of the vessel; that examination then made resulted in water being found in the between-decks of the steamship aft, such water extending about half way from the side of the ship to the hatch coamings, but the aperture through which such water entered the vessel could not, after diligent search for the same, be discovered; that seamen were put to work passing such water down the hatches into the hold so as to bring it within reach of the bilge pumps and such pumps were kept in operation, notwithstanding which the water steadily increased between-decks, and the list of the vessel became so great that, at about the hour of 5 o'clock a. m., it was deemed by the master of said vessel prudent to make for Port Harford with all convenient speed, which was done, and the said vessel, at about the hour of seven o'clock a. m. of said 30th day of April, 1888, was run upon the beach at said Port Harford, at which place sea water immediately came in over her deck, and nearly filled the vessel with water, and thereby said merchandise became wet with sea water. That the beaching of said steamship was necessary to prevent, and avoid, a total loss of said steamship and of all the said merchandise then on board of her, and was done by the master thereof as the result of cool deliberation, and in the exercise of a wise discretion on his part as to what was best to be done, and with the purpose of saving said vessel and cargo and of rendering entirely safe the lives of all the persons, passengers and crew, two hundred and twelve (212) in number, then on board of said steamship.

73 II.

That the said Pacific Coast Steamship Company, owner of said steamship, did at all times and immediately prior to the sailing of said steamship from the said port of San Francisco with such merchandise on board of her, exercise due diligence to make the said steamship in all respects seaworthy and properly manned, equipped, and supplied for her then intended voyage, to wit, a voyage to San Diego

and certain way ports and return. That the crew of said steamship was composed, during the times referred to, of persons competent to discharge the duties pertaining to their several stations on board of said vessel.

III.

That said merchandise has heretofore all been delivered, by the Pacific Coast Steamship Company, at said port of San Francisco.

IV.

That said merchandise was delivered to the Pacific Coast Steamship Company and was received, carried, and so delivered by it under and in pursuance of the laws of the State of California, and the provisions of a special contract theretofore made by or for the owner of said merchandise with the said steamship company, in said State, a copy of which said contract is attached to said libel, and made a part thereof; and that said merchandise was damaged, if at all, in said State.

74 And for a further and separate defense to the cause and causes of action in said libel alleged, claimant alleges: That the same are, and each of them is, barred by the laches of libelant in the prosecution of the same; and in that behalf specifies the following:

(*a*) That the same are, and each thereof is, barred by the terms of the contract alleged in said libel, and dated on, to wit, the — day of April, 1888, that is to say, the portions thereof in the words and figures following: "It is expressly agreed that all claims against the P. C. S. S. Co., or any of the stockholders of said company, for damage to or loss of any of the within merchandise, must be presented to the company within thirty days from date hereof; and that after thirty days from date hereof, no action, suit, proceeding, in any court of justice, shall be brought against said P. C. S. S. Co., or any of the stockholders thereof for any damage to or loss of said merchandise; and the lapse of said thirty days shall be deemed a conclusive bar and release of all right to recover against said company, or any stockholders thereof, for any such damage or loss," the fact being, and the Pacific Coast Steamship Company, claimant, so alleges, that libelant did not present or cause to be presented to said company within such thirty (30) days, his, its, or their claim for the damages, or of any part thereof, in said libel alleged, nor was this, or any, proceeding commenced in any court within said thirty (30) days; nor at any time prior to the 28th day of April, 1892, at which time said steamship was not within northern district of California; nor was said steamship seized by the marshal under process issued in this proceeding, until the 4th day of May, 1892. That the said

75 merchandise became wet with sea water, as herein alleged, on, to wit, the 30th day of April, 1888, and such fact was, as claimant is informed, and believes and alleges, known to libelant on, or prior to, the 1st day of May, 1888.

(*b*.) That the same is, and are, barred by the provisions of section 337 of the Code of Civil Procedure of the State of California.

(c.) That the same is, and are, barred by the provisions of section 338 of the Code of Civil Procedure of the State of California.

(d.) That the same is, and are, barred by the provisions of section 813 of the Code of Civil Procedure of the State of California.

(e.) That the same is, and are, barred, by such laches on the part of libelant, delay in the prosecution of his suit for such length of time, as constitutes, and is, a bar to a recovery thereof, in a court of admiralty. And further, that by reason of the delay of libelant, in commencing such suit, claimant is, and will be, deprived of the testimony of certain persons, members of the crew of said steamship "Queen of the Pacific" at the times referred to in said libel, which persons were and are the only persons who were specially conversant with the condition of certain dead-lights and a certain dead-light, of said steamer, at the time said steamship sailed on said voyage; and each of said persons knew that the said dead-lights were, and that each of the same was closed, and well fastened, and particularly that the after dead-light in the starboard alleyway of said steamer was so closed and well fastened, prior to, and at the
76 time, said steamship sailed on said voyage, and would so testify; and claimant believes, and alleges, that their testimony would establish such fact, to the satisfaction of this court, could such persons be produced as witnesses upon the trial of this action; that the names of such persons, whose evidence claimant is informed and believes and alleges is, and will be, so lost, to claimant, by virtue of the said laches and delay of libelant are: J. W. Ingraham, who was third officer of said steamship during the times referred to; Frank Esmelts, who was during such time captain of the hold; and Olai Johnson, who was a seaman; each and all of whom could and would have been produced, as witnesses for claimant, upon the trial of said suit, had the same been commenced within a reasonable time, to wit, the time limited by the laws of the State of California for the prosecution of the same.

Wherefore, claimant prays that libelant take nothing in above-entitled cause; that said libel be dismissed, and that claimant recover its costs and charges herein incurred, with such other relief as may be just.

GEO. W. TOWLE, JR.,
Proctor for Claimant.

And answering unto the further, separate and second cause of action of said A. Haas, J. Baruch, and H. W. Hellman:

I.

Alleges that the Pacific Coast Steamship Company, claimant, its agents and servants, has and have no knowledge, information, or belief sufficient to enable it or them to answer the matters
77 alleged in article I of said libel, and therefore, placing its denials upon such ground, denies that said libelants A. Haas, J. Baruch and H. W. Hellman, were at all, or any — the times in said libel mentioned, partners doing business under the firm name and style of Hellman, Haas & Co., or otherwise, and on

like grounds denies that on or about the 26th day of April, A. D. 1888, Downing & Schmidt, or any one, shipped in good order and condition, or otherwise, the merchandise mentioned in said libel, or any thereof, on the steamship "Queen of the Pacific." And, further, upon its information and belief alleges, that said alleged partnership had not, prior to the time this proceeding was commenced, filed with the clerk of the county in which its principal place of business is situated, a certificate stating the names in full of all the members of such partnership and their place of residence, and published such certificate, or caused the same to be published once a week for four successive weeks in a newspaper published in such county, or in a newspaper published in any county adjoining such county.

II.

Denies that on or about the 26th day of April, 1888, or at any time, at the port of San Francisco, in the State of California, or elsewhere, Downing & Schmidt, or any one, shipped in good order and condition, or otherwise, or at all, the merchandise mentioned in said libel, or any thereof, on the steamship "Queen of the Pacific," then and there belonging to or employed by the Pacific Coast Steamship Company, a corporation, or otherwise, employed, to be in and by said steamship transported to the port or place of San Pedro,
78 in said State, or elsewhere, and there, or elsewhere, to be delivered in like good order and condition as when received, or otherwise, or at all, unto Hellman, Haas & Co., and denies that the said Pacific Coast Steamship Company, when it received said goods, or any thereof, on board the said steamship for transportation as aforesaid, entered into a contract of affreightment in writing with this libelant, wherein it acknowledged to have received said goods in apparent good order, or otherwise, and then and there promised and agreed to transport said goods to said port of San Pedro, or elsewhere, and there deliver them unto Hellman, Haas & Co., in like good order as when received, certain perils in said agreement mentioned excepted, or otherwise; and denies that the said steamship company received said merchandise, on board of said steamship, but the contrary; and in that behalf, alleges that the merchandise referred to in said libel, was delivered, or caused to be delivered, to the Pacific Coast Steamship Company, by the owner thereof, at San Francisco, to be by said steamship company forwarded to said San Pedro, the same to be so forwarded at the option of said steamship company, upon said steamship "Queen of the Pacific," or upon any other steamship company under a certain special contract, and agreement in writing, relating thereto, made and entered into prior to such delivery, and on, to wit, the 26th day of April, 1888, by and between said owner of said merchandise and said steamship company; which said agreement is referred to in said libel, and a copy thereof attached thereto and made a part thereof.

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III.

Admits that said steamship thereafter sailed from the port of San Francisco, bound to said port of San Pedro with the merchandise mentioned in said contract on board thereof; admits that the same was not delivered at said San Pedro; admits that the same was returned to said San Francisco; admits that the same was damaged by reason of having been wet with sea water, but denies that the same was so wet with sea water during said voyage or by reason of the negligence of said steamship company, its officers and servants, or either of them, and denies that by reason of such, or any such, negligence, sea water, or any water, gained access to the interior of said ship where said merchandise was stowed, on or about the 30th day of April, 1888, or at any other time, or date, or at all.

IV.

Denies that at the time said libel was filed said steamship was in the northern district of California; and in that behalf alleges, that when said libel was filed said steamship was, and for four (4) days and upwards continuously thereafter, she, said steamship, remained without the said northern district of California.

V.

Denies that in consequence of the alleged injury and damage to said merchandise by sea water as in said libel, article V thereof, or elsewhere therein alleged, libellants have sustained damages in the sum of sixty-three $\frac{20}{100}$ dollars, or thereabouts, or in any other sum, or at all.

80

VI.

Denies that all and singular, or any, the premises, in said libel alleged, are true, save as in this answer specifically admitted, and denies that the same, or any thereof, were, when said libel was filed in the above-entitled court, within the admiralty and maritime jurisdiction of this honorable court.

VII.

Alleges that the said contract, a copy of which is attached to said libel, is a contract between the owner of said merchandise and the said Pacific Coast Steamship Company individually, and not with said company as agents for the steamship "Queen of the Pacific," or the steamship "Queen;" and further, that the said contract was entered into in the State of California, by persons then resident therein, and that said contract was to be performed in said State, and that the damage to such merchandise, if any, occurred in said State.

VIII.

Alleges that, at and during all the times in said libel referred to, the said Pacific Coast Steamship Company was the owner of the

said steamship "Queen of the Pacific." That said company was then engaged in the carriage of passengers and merchandise, by water, under and pursuant to special contracts relating to such carriage, made in the State of California, and that during said times it employed, and used, the said steamship "Queen of the Pacific" and numerous other steamers and vessels in performing its
81 obligations under such special contracts, and that the merchandise referred to in said libel was placed upon said steamship, by said steamship company, for carriage to its destination pursuant to its said contract with said owners thereof, so made, not because such, or any, contract required that it should be so placed and so carried, but because it suited the then convenience of said steamship company and its business that the same should be so placed and carried.

And as a further and separate answer and defense, the Pacific Coast Steamship Company, claimant, alleges:

I.

That said steamship "Queen of the Pacific" was, when she sailed from said port of San Francisco, as in said libel alleged, stout, staunch, strong and in every respect seaworthy, and in such condition sailed from said port of San Francisco fully and completely manned, officered and equipped for her then intended voyage, and with merchandise on freight, and a large number, to wit: one hundred and twenty-two (122) persons, men, women and children, passengers, on board of her. That she left Broadway wharf No. —, at said San Francisco, at about the hour of two o'clock, p. m., of April 29, 1888, and proceeded down the bay, out through the Golden Gate, across the bar and on her course in a southerly direction, with a fresh northwest wind blowing and a northwest chop sea. That no unusual incident was known to occur during said 29th day of April, 1888. That about one o'clock a. m., of the 30th day of April, said steamship was noticed to have a slight list to starboard;
82 that efforts were then made to correct such list by shifting freight to port in the between-decks, and burning coal mostly from the starboard bunkers. That about 2.15 or 2.30 o'clock a. m. of Monday, April 30, 1888, water was discovered to be dropping from a point in the iron bulkhead on the starboard side of the engine-room, and about six (6) or eight (8) inches above the deck of the alleyway in the between-decks of the vessel; that examination then made resulted in water being found in the between-decks of the steamship aft, such water extending about half way from the side of the ship to the hatch coamings, but the aperture through which such water entered the vessel could not, after diligent search for the same, be discovered; that seamen were put to work passing such water down the hatches into the hold so as to bring it within reach of the bilge pumps and such pumps were kept in operation, notwithstanding which the water steadily increased between-decks, and the list of the vessel became so great that, at about the hour of five o'clock a. m., it was deemed by the master of said vessel, prudent to

make for Port Harford with all convenient speed, which was done, and the said vessel, at about the hour of seven o'clock a. m., of said 30th day of April, 1888, was run upon the beach at said Port Harford, at which place sea water immediately came in over her deck, and nearly filled the vessel with water, and thereby said merchandise became wet with sea water. That the beaching of said steamship was necessary to prevent, and avoid, a total loss of said steamship and of all the merchandise then on board of her, and was done by the master thereof as the result of cool deliberation, and in the exercise of a wise discretion on his part as to what was best
83 to be done, and with the purpose of saving said vessel and cargo and of rendering entirely safe the lives of all the persons, passengers and crew, two hundred and twelve (212) in number, then on board of said steamship.

II.

That the said Pacific Coast Steamship Company, owner of said steamship, did at all times, and immediately prior to the sailing of said steamship from the said port of San Francisco with such merchandise on board of her, exercise due diligence to make the said steamship in all respects seaworthy and properly manned, equipped, and supplied, for her then intended voyage, to wit: a voyage to San Diego, and certain way ports and return. That the crew of said steamship was composed during the times referred to, of persons competent to discharge the duties pertaining to their several stations on board of said vessel.

III.

That said merchandise has heretofore all been delivered, by the Pacific Coast Steamship Company, at said port of San Francisco.

IV.

That said merchandise was delivered to the Pacific Coast Steamship Company, and was received, carried and so delivered by it under and in pursuance of the laws of the State of California, and the provisions of a special contract theretofore made by, or for the owner of said merchandise with the said steamship company,
84 in said State, a copy of which said contract is attached to said libel, and made a part thereof; and that said merchandise was damaged, if at all, in said State.

And for a further and separate defense to the cause and causes of action in said libel alleged, claimant alleges:

That the same are, and each of them is, barred by the laches of libelant in the prosecution of the same; and in that behalf specifies the following:

(a.) That the same are, and each thereof is, barred by the terms of the contract alleged in said libel, and dated, on, to wit: the 26th day of April, 1888, that is to say: the portions thereof in the words and figures following: "It is expressly agreed that all claims against

the P. C. S. S. Co., or any of the stockholders of said company, for damage to or loss of any of the within merchandise, must be presented to the company within thirty days from date hereof; and that after thirty days from date hereof, no action, suit or proceeding, in any court of justice, shall be brought against said P. C. S. S. Co., or any of the stockholders thereof, for any damage to or loss of said merchandise; and the lapse of said thirty days shall be deemed a conclusive bar and release of all right to recover against said company, or any of the stockholders thereof, for any such damage or loss," the fact being, and the Pacific Coast Steamship Company, claimant, so alleges, that libelant did not present or cause to be presented to said company within such thirty (30) days his, its, or their, claim for damages, or of any part thereof, in said libel alleged,
nor was this, or any, proceeding commenced in any court,
85 within said thirty (30) days; nor at any time prior to the 28th day of April, 1892, at which time the said steamship was not within the northern district of California; nor was said steamship seized by the marshal under process issued in this proceeding, until the 4th day of May, 1892. That the said merchandise became wet with sea water, as herein alleged, on to wit, the 30th day of April, 1888, and such fact was, as claimant is informed and believes and alleges, known to libelant on, or prior to, the 1st day of May, 1888.

(*b.*) That the same is, and are, barred by the provisions of section 337 of the Code of Civil Procedure of the State of California.

(*c.*) That the same is, and are, barred by the provisions of section 338 of the Code of Civil Procedure of the State of California.

(*d.*) That the same is, and are, barred by the provisions of section 813 of the Code of Civil Procedure of the State of California.

(*e.*) That the same is, and are, barred by such laches on the part of libelant, delay in the prosecution of his suit for such length of time, as constitutes, and is a bar to a recovery thereof in a court of admiralty. And further: that by reason of the delay of libelant, in commencing such suit, claimant is, and will be, deprived of the testimony of certain persons, members of the crew of said steamship "Queen of the Pacific" at the times referred to in said libel, which persons were and are the only persons who were specially conversant
with the condition of certain dead-lights and a certain dead-
86 light, of said steamer, at the time said steamship sailed on said voyage; and each of such persons knew that the said dead-lights were, and that each of the same was closed, and well fastened, and particularly that the after dead-light in the starboard alleyway of said steamer was so closed and well fastened, prior to, and at the time said steamship sailed on said voyage, and would so testify; and claimant believes, and alleges, that their testimony would establish such fact, to the satisfaction of this court, could such persons be produced as witnesses upon the trial of this action; that the names of such persons, whose evidence claimant is informed and believes and alleges is, and will be, so lost, to claimant, by virtue of the said laches and delay of libelant, are: J. W. Ingraham, who was third officer of said steamship during the times referred

to; Frank Esmelts, who was, during such time, captain of the hold; and Olai Johnson, who was a seaman; each and all of whom could and would have been produced, as witnesses for claimant, upon the trial of said suit, had the same been commenced within a reasonable time, to wit, the time limited by the laws of the State of California for the prosecution of the same.

Wherefore, claimant prays that libelant take nothing in above-entitled cause; that said libel be dismissed, and that claimant recover its costs and charges herein incurred, with such other relief as may be just.

GEO. W. TOWLE, JR.,
Proctor for Claimant.

(Endorsed:) Filed July 3d, 1894. Southard Hoffman, clerk, by J. S. Manley, deputy clerk.

87 (Style of Court and Title of Cause.)

Testimony. Filed May 9th, 1896.

MONDAY, *May* 4, 1896.

Now this libel coming on regularly upon the calendar, the following proceedings are had:

Mr. ANDROS: This case is one of the first of a series of quite a number of cases, which your honor will recollect were consolidated, or rather, all growing out of the same transaction. We propose to try the case of Bancroft Company, and also the case of Hellman, Haas, and others, who were shippers of goods on the "Queen" at the time when this misfortune overtook her. The reason that we take these two cases is that in some of the cases different questions arise, and we think these two cases will present all the questions of law that will arise in any one or more of the series of cases which are dependent, and then the disposition of the others will be a matter of subsequent arrangement after final decision shall have been reached in the two cases that I now mention.

On or about the 28th day of April, 1888, the Bancroft-Whitney Company shipped certain goods on board the steamer "Queen," to be transported to San Diego, I think. The shipping receipt, such as the Pacific Coast Steamship Company usually gave, was delivered to them. The answer admits the delivery of these goods, a qualified delivery—that is, admits that they were on board the ship at the time of the disaster. It is also agreed between Mr. Towle,
88 counsel for claimant, and myself, that the damages of the Bancroft-Whitney Company, although quite large, as alleged, shall be taken and deemed to be the sum of $200, so it shall be unnecessary to put any proofs into the case in respect to their damages.

The steamer "Queen," or "Queen of the Pacific" it was then, sailed from here bound to various way ports, and to San Diego, on the 28th day of April, 1888. Her stopping places on the route were,

first Port Harford, then Santa Barbara, then San Pedro, and finally the terminal point San Diego. She sailed from here about, as appears from the pleadings, in the neighborhood of 2 o'clock on the afternoon of the 28th day of April, in the year that I have just mentioned. It appears from the answer that nothing of any importance happened until 1 o'clock or between 1 and 2 o'clock on the morning of the 29th of April, when it was discovered that water was coming into the between-decks. The answer alleges that an effort was then made to find the possible aperture through which the water came, but they failed to discover it, certainly at that time. The ship continued to make water, and had quite a list to the starboard. Efforts were made on the part of the officers of the ship, to get her on an even keel by burning coal out of the starboard bunkers, and also by changing, I think, some of the cargo, so she would roll over toward the port. These efforts proved unavailing, because the water continued to collect in her between-decks, and some effort was made to get into the lower hold so that it might be released by the pumps, and I think such was the fact; they opened some of the scuttles,
some aperture by which the water was permitted to go into
89 the lower hold so it might be reached by the pumps. This list increased, and the ship bore away to her first port of destination, Port Harford. When she got to Port Harford, as I understand, the water was about over her on the starboard. When she got within about three or four hundred yards, two or three hundred yards, of the wharf, which was where she usually made fast, she sank; the water came up in the engine-room, the fires were extinguished, and the vessel sank, I think in about seventeen feet of water; I am not sure about that. The consequence was that all the merchandise on board of her was submerged. After the vessel had been raised, which I think was in the course of a week, she returned to San Francisco, and the cargo was discharged here in a damaged condition.

The answer to the libel admits that these goods were on board the ship; admits that water was between-decks; that the goods were brought back here wet and in a damaged condition by sea water. The libel alleges that the water gained access to her during this voyage through the negligence of the owner of the ship, their officers and servants or agents.

In this case, the Bancroft-Whitney Company, the usual form of shipping receipt was given—what is called, I believe, a memorandum, but contains all the elements of a bill of lading, but is not given as full in some respects; given in this small way for convenience sake, because where a ship is taking large quantities of goods, it would be somewhat onerous to make out a bill of lading
in the usual form; but these shipping receipts are really, as
90 matter of law, bills of lading, and they contain the various exceptions exonerating the carrier from certain risks and certain perils.

In the other case, that of Hellman, Haas & Company, there the goods were shipped on or about the 27th or 28th of April, and on the 30th of April, a bill of lading was given for them in the regu-

lar form. I do not understand it contains any stipulations materially different from those in the small shipping receipts to which I have alluded. The amount of goods here was quite large, some $9,000, more or less. There is no admission about damages, and those we shall necessarily have to prove.

I believe that is all that is necessary to state so as to apprise the court of the general nature of this transaction—the general nature of the proceedings in the cause.

ABRAHAM HAAS, one of the libelants, being first duly sworn, testified as follows:

Direct examination.

Mr. ANDROS:

Q. Mr. Haas, are you the member now of any firm of merchants?

A. Yes, sir.

Q. Of what firm?

A. Of Haas, Baruch & Co., of Los Angeles.

Q. Were you the member of any firm on the 27th day of April, 1888?

A. Yes, sir.

Q. Of what firm were you then a member?

A. Hellman, Haas & Company.

Q. Of whom was that firm then composed?

A. Of H. W. Hellman, Jacob Haas, myself, and J. Baruch

91 Q. A. Haas, J. Baruch, H. W. Hellman and Jacob Haas?

A. Yes, sir.

Q. Did Mr. J. Haas die subsequent to that time?

A. Yes, sir.

Q. About what time was it, if you recollect, that he died?

A. He died in June or July, 1890, I think.

Q. Might it not have been June, 1889?

A. 1889, rather.

Q. Then the surviving partners were A. Haas, J. Baruch, and H. W. Hellman?

A. Yes, sir.

Q. Do you recollect the occasion when the steamship "Queen of the Pacific," sailing from this port, the port of San Francisco, and bound south, met with a disaster so that she sank at Port Harford?

A. Yes, sir, I was here at the time.

Q. Did your firm have any merchandise on board of her at that time?

A. Yes, sir.

Q. To what place was that merchandise bound?

A. For Los Angeles.

Q. Consigned to your firm?

A. Yes, sir.

Q. Will you examine that paper, please, marked "merchandise on steamer 'Queen,'" and state what it is, what the items are?

A. That is either the bill, or a copy of the bill, which we handed to Gutte & Frank for the goods shipped on the "Queen."

Q. Do you know what goods were shipped on board of her?
A. I know by the bills.
92 Q. Please to state. Refresh your memory from that paper and state what they were.

Mr. TOWLE: I object to any testimony from that paper.

Mr. ANDROS:

Q. In whose handwriting is that?
A. This is in the handwriting of a clerk of ours who was with us then, and who is with us now in Los Angeles.

The COURT:

Q. Do you know anything about that paper yourself?
A. Nothing more than that I told the young man to make it out at the time. He made it out under my supervision.

Mr. TOWLE: My objection is not to the sufficiency of the memorandum, but that the bill of lading is the only evidence as to the shipment.
Mr. ANDROS: The original bill of lading is annexed to the libel, and the goods mentioned in it are admitted to have been on board.

Q. I will ask you to see, as I read this, whether it corresponds to what is on the back of this bill of lading. 50 cases canned vegetables.

Mr. TOWLE: We object to that as irrelevant, immaterial and incompetent, whether it agrees with the memorandum or not.
Mr. ANDROS: I propose to prove the cost prices of these goods by Mr. Haas, and I want to simply identify these goods by that memorandum so that he may testify as to the cost. It is simply to see whether it corresponds in amount—species, I mean—with that memorandum. For instance, here was 50 sacks of the canned
93 vegetables. I want to see what the value of those was, but I want to see that that memorandum contains the articles that are here.
Mr. TOWLE: So far as it has a bearing on the question of price; if the witness proposes to testify from that memoranda as to prices, we shall object to that. We object to these questions. If the witness is to testify, he can as well testify from the items on the bill of lading, as from a memorandum which agreed with those items.
The COURT: His memorandum probably has the prices attached.
Mr. ANDROS: Yes, sir.

Q. 50 cases of canned vegetables; what was the price of this, Mr. Haas?

Mr. TOWLE:

Q. Are you testifying from your memorandum or from your knowledge?
A. I am testifying from the memorandum.

Mr. ANDROS:

Q. Did you at the time know the cost of these goods?
A. Yes, sir.
Q. Did you buy them?
A. Yes, sir.
Q. Bought them yourself here?
A. Either bought them myself, or they were bought under my supervision.
Q. So at that time, you did know what they cost?
A. Yes, sir.
Q. Did you subsequently instruct that memorandum of that cost to be made?
A. Yes, sir.
Q. At the time that you made that memorandum yourself, or had it made under your supervision, were the figures therein mentioned the true cost of these goods?
94 A. Yes, sir.

Mr. TOWLE: We ask that the answer be stricken out. We object to that as irrelevant, immaterial, and incompetent testimony; that the witness cannot prove these values by reference to some figures appearing on a paper. If these goods were bought they must have bills for them, which would be the best evidence, I take it of what the goods cost them, better than some memorandum made up by a clerk in their office. We object to any testimony with reference to values based upon this memorandum, no matter how made up, at that time or at any time; that values ought to be capable of proof by bills or by the testimony of those who sold them, or by the testimony of somebody who knows what they paid for them.

Mr. ANDROS: It seems to me to be perfectly competent to prove value. Mr. Haas testifies that he knew what they were; he bought them himself, or they were bought under his supervision; that he knew what those goods cost; that he made up that list of prices, or they were made up under his supervision, and he knew at the time they were put down there that they were the actual prices that he paid for those goods. After the lapse of some seven or eight years, it is not at all likely that a man can recollect what he paid for a certain case of goods, but where a memorandum has been made by a party at the time, or made under his supervision and that memorandum of prices was true at the time and he knows it to be true, why then he can refresh his memory from that memorandum. It does not matter what memorandum it is, provided that he is
95 able to say, "Refreshing my recollection from that memorandum, I know what the cost of those goods was."

Mr. TOWLE: We submit that the only memorandum that can be used, is one made by himself at the time.

The COURT: Or under his direction.

The WITNESS: It was by our book-keeper.

Mr. TOWLE: But he directs somebody to make up a memorandum, and that party presents that to him; that does not authorize him to testify from it. If he participated in it, if he read off the items

at the time and the other party did merely clerical duty, that might enable him to use this; but to refer a matter to a clerk and say "Make up a statement of account," is not such a memorandum as will authorize him to use that in his testimony. That, I take it, to be this case.

The COURT: He goes farther than that. He says he knew it to be correct.

Mr. ANDROS:

Q. With reference to the time these goods were shipped, when was that memorandum made?

A. I suppose immediately after the ship went down.

The COURT:

Q. I understood you to say that you knew that the charges there were correct at the time?

A. Yes, sir.

Q. At that time?

A. They were made from the invoices, copy of the invoices.

Mr. TOWLE:

Q. Mr. Haas, did you compare that memorandum with the invoices after it was handed to you?

96 A. That I am not sure of, but I imagine I did. I could not say now after the lapse of so many years what I did do.

Q. Hellman, Haas & Co., still exists?

A. Their successors exist.

Q. Their books of account at that time still exist?

A. I think they do.

Q. You know from whom those goods were bought?

A. Yes, sir, they can be dug up if the books and papers are not destroyed.

Q. If those books exist, it is easy to show the amounts paid for those several items?

A. Yes, sir, if the books exist.

Mr. TOWLE: We submit that this memorandum is not the best evidence.

The COURT: I think it comes within the rule that where a person knows the correctness of a book, he may refresh his recollection although the entry may not have been made by him. Motion to strike out denied.

Mr. TOWLE: Save an exception.

Mr. ANDROS:

Q. What was the cost price of the 50 sacks of canned vegetables?

Mr. TOWLE: We object to that question because the answer is based upon that memorandum which the witness holds in his hand.

The COURT: Objection overruled.

Mr. TOWLE: Exception.

A. 100 dozen asparagus costing $1.75 per dozen.

Q. How much does that amount to?
A. $175.
97 Q. 250 kegs of nails; were there 250 kegs of nails aboard the ship?

Mr. TOWLE: We object to that question so far as it is based on that memorandum. It is understood that all these questions are objected to, and exceptions saved.

Mr. ANDROS:

Q. What was the cost of the 250 kegs of nails?
A. $775.
Q. 200 sacks of rice?
A. 400 sacks here.
Q. Yes; 400 sacks of rice?
A. At five and one-quarter cents a pound, 100 pounds in a bag, $2,100.
Q. 20 packages of tea?
A. 360 pounds at 24 cents, $86.40.
Q. 3 barrels of currants?
A. 968 pounds at 6¾ cents per pound, $66.55.
Q. 420 mats of rice?
A. At $4.20 per hundred, $861.
Q. 250 barrels of sugar?
A. 75,709 pounds at 6½ cents, $4,921.09.
Q. 100 half barrels of sugar.
A. 13,991 pounds at 6¾, $944.39.
Q. 10 cases salad oil?
A. $9 per case, $90.
Q. 35 cases of pickles?
A. There are 25 cases of pickles and 10 cases of chow-chow, also pickles; 50 dozen at $1.75, and 20 dozen at $1.75; the first item is $87.50 and $35.
Q. I notice 13 cases of drugs. Have you any recollection of that?
98 A. I think there were 13 cases of Florida water. I am quite sure there was.
Q. What was the cost of that, if you know?
A. It is down there. I don't remember (referring to paper), $63.20.

Mr. ANDROS: For the information of the court, I will state that 13 cases of drugs is not embraced in this bill of lading, but is embraced in one of the shipping receipts of which I spoke in stating the case to the court.

Q. What was the price of it?
A. $63.10.
Q. It was called drugs, was it?
A. Yes, sir; shipped as drugs.
Q. Farnsworth & Ruggles: who were they, do you know?
A. They are our draymen.

Q. The bill of lading begins "Shipped by Farnsworth & Ruggles." They were your drayman who delivered the goods at the wharf?

A. Yes, sir.

Q. Who are Downing & Schmidt?

A. Downing & Schmidt were, and probably are yet, agents for the sale of Florida water, who shipped the 13 cases of drugs for us.

Q. Were you here when those goods arrived back?

A. Yes, sir.

Q. What was done with them?

A. They were turned over to Newhall & Company, the auctioneers.

Q. Sold by Newhall & Company?

A. Yes, sir.

Q. Did you see them yourself and inspect them after they came back?

99 A. I didn't inspect them particularly; I saw them at the wharf as they were unloaded, or some of them.

Q. Were the cases in a damaged condition when you saw them?

A. Yes.

Q. Wet?

A. Yes, sir.

Mr. ANDROS: I think that is all.

Cross-examination.

Mr. TOWLE:

Q. Farnsworth & Ruggles were authorized to represent Hellman & Haas in connection with this merchandise, were they?

A. They shipped the goods and took the receipts in their name.

Q. All but the Florida water?

A. Yes, sir. I believe that is customary.

Q. If they signed a contract relating to the shipment of those goods, they were authorized to do that for you, were they?

A. Yes, sir, I believe so.

Q. And whoever delivered the 13 cases of Florida water for shipment was authorized to sign the contract relating to the shipment of that lot of merchandise, also?

A. As is usual in such cases, yes, sir.

Q. How came this memorandum, which you have used in stating these values, to be made?

A. This one here?

Q. Yes.

A. This is an order to collect our insurance money from

100 Messrs. Good & Frank. This memorandum was made of the cost of the goods, and the proceeds of the sale of the goods were deducted therefrom.

Q. It was made for the purpose of representing values to the insurance company?

A. Yes, sir.

Q. Was that furnished the insurance company at the time you insured the goods?

A. I expect it was. I don't remember.

Q. Do you know whether it was furnished at that time, or after the steamer returned?

A. We had an open policy at that time, and I think we had——

Q. Never mind the policy.

A. We declare the value of the shipments after the clerks make up the amounts, probably within two or three days after the ship leaves, or one day, as soon as they have time. That is our usual way of doing it for the last twenty years.

Q. And this was made up for the purpose of declaring values to the insurance company?

A. Yes, sir.

Q. How soon after that shipment was made did you know of the misfortune to the steamer?

A. As soon as it happened.

Q. On the 30th of April?

A. I think so, or the following day.

Q. Was this merchandise delivered to Hellman, Haas & Co., on the return of the steamer to San Francisco?

A. Yes, sir, it was returned to us, or we took charge of it, whichever way it was at that time, with the consent of Good & Frank, or with an understanding that we should have the goods sold.

101 Q. What I ask is, Was that merchandise delivered to Hellman, Haas & Co., at San Francisco by the steamship company?

A. I think so.

Q. Prior to that delivery you had been required to give a general average bond, had you not?

Mr. ANDROS: That is objected to. I do not see the materiality of a general average bond.

A. If we give one, I suppose we were required to do so. I don't know whether we gave a bond or not.

Mr. TOWLE:

Q. Prior to the return of the steamer here, had you received from any source notice of the condition of the merchandise?

A. No, sir.

Q. Do you remember the exact date, or how soon after shipment it was, that you saw the merchandise on the wharf?

A. No, sir; I don't remember. As soon as the goods were unloaded, I naturally felt an interest in seeing how they looked, and went to the wharf and saw them from day to day.

Q. Was that within a week or ten days from the time they were shipped?

A. I imagine so.

Q. Have you any memoranda which would enable you to state the date which you saw it?

A. No, sir.

Q. You say the merchandise was turned to Newhall for sale?
A. Yes, sir.
Q. Was that by a written notice?
A. I don't recollect.
Q. Are you able to state the date that that was done?
A. No, sir.

102 Q. The statement of values of merchandise—I understand your statements have all been made from the written memoranda which you have produced here and used in connection with your testimony?
A. Yes, sir.
Q. Independent of that, at this time you have no knowledge of those values?
A. No, sir.

Mr. ANDROS:

Q. Do you recollect what wharf they were at, whether they were at the seawall?
A. I am not acquainted with the wharves here; I don't remember.
Q. Was it the seawall?
A. I don't remember; I don't know the names of the wharves.

E. W. NEWHALL, a witness called on behalf of the libelants, being first duly sworn, testified as follows:

Direct examination.

Mr. ANDROS:

Q. Mr. Newhall, in April, 1888, were you a member of any and what firm?
A. I was a member of the firm of Newhall Sons & Co.
Q. And they were auctioneers?
A. Auctioneers and commission merchants.
Q. Have you any recollection of merchandise being landed from the steamer "Queen of the Pacific" in a damaged condition, in May, 1888?
A. Well, I remember that there were; I don't remember the date that they were landed.
Q. Where were they landed, if you know?

103 A. At the seawall.
Q. What, if anything, did you have to do with any of those goods that were landed, I mean as a firm of auctioneers?
A. The firm sold them at public auction.
Q. Do you recollect whether you sold anything from that steamer in a damaged condition for Hellman, Haas & Co.?
A. We did.
Q. Did you catalogue and advertise those goods?
A. We did.
Q. Have you got a catalogue from which you sold there?
A. I have.

Q. Will you please produce it? (Witness produces the book.)
Q. Are you able to state what goods you sold for Hellman, Haas & Co.?
A. Identify them by the catalogue?
Q. Yes, sir.

Mr. TOWLE: We object to that as irrelevant, immaterial, and incompetent. Whatever goods he may have sold for Hellman, Haas & Co. is immaterial from any view of this case.

Mr. ANDROS: If your honor please, I propose to prove by Mr. Newhall that these goods which Mr. Haas has testified he shipped on board that vessel and which were brought back in a damaged condition, were sold by Mr. Newhall; that he sold the same article and the same number, that is, 50 sacks rice, 50 cases of canned goods, or whatever it may be, for the purpose of showing what the loss
104 was, because these goods we claim were brought back damaged by the negligence of this carrier. Of course we can only recover what our loss is, and the best way in the world of ascertaining the value of damaged goods is to sell them at public auction, because there they are brought into the competitive market.

The COURT: I suppose they will be identified as the goods shipped on the "Queen" on this particular voyage?

Mr. ANDROS: Yes, sir. They are all marked "H. H. & Co." and the bill of lading is marked "H. H. & Co."

Mr. TOWLE: I wish simply to state my position. What these goods sold for in a damaged condition at public auction is no more certain criterion of their value in that damaged condition than would be a report of sales of similar quantities of goods in good condition at public auction, as determining the amount of money which went into those goods and what they were worth. Of course, everybody understands that sales at auction are not expected to realize what merchandise realizes at private sale. Here we have as the first element of value what the merchandise sold for at private sale. Now they propose to undertake to fix upon us the difference between a purchase at private sale and a sale at public auction. We say that that is not a fair criterion. It only goes to show possibly what sort of combination may have been made in connection with it, or how good or how bad a trade somebody may have made. My proposition is that they must show what the condition of these goods was, and what their actual value was, from somebody who made an examination of those goods, and is able to state to what extent they were damaged.

105 The COURT: You do not make any point then, on connecting this sale with the shipment?

Mr. TOWLE: I say the price realized is immaterial. It does not tend to show the actual value of the goods, and we object too upon that ground, that they must prove the damage by some source which goes to the condition, and then experts can testify from that condition as to the extent of the damage.

Mr. ANDROS: The records of this court will disclose that cases of importance—at least, one that I know of, was stopped for the ex-

press purpose of having the goods, on the recommendation of the court, sold at auction, as being the best way to dispose of them. Suppose they had been appraised by an appraiser at 50 per cent. damage, and yet they could have sold those goods at only 25 per cent. of their first cost. What they sold for is the criterion of the damage. Here are goods put up, confessedly, admittedly, brought back wet with sea water. They could not have put them in private shops and sold them; it would not be a practicable thing. People are not going to take goods reeking with salt water and put them back on the shelves of their grocery stores. These goods were landed on the wharf. They were sold, and necessarily had to be sold at auction because nobody could tell exactly what condition they were in, even if they had examined them. The question is, What have these parties suffered by reason of this catastrophe. They have suffered the difference between what they paid for those goods and what they were fairly sold for. They had to be sold to ascertain their value. An appraisement does not establish their value.

106 It is what they got for them in open market that fixes the damage. It would be the strongest kind of *prima facie* evidence, but we go further than that and say that it shows absolutely what the damage was, because there is no means of arriving at the damage except by selling. Sometimes where goods are slightly damaged a man may say, "Well, I will take them myself," but where they are sodden with sea water, and the quality of the goods—I suppose that tea would be worth very much after it had been sunk in salt water for a week or more. I don't think that rice would be much improved by it, or any of the articles mentioned in this list. I recollect that many years ago a ship arrived here from Antwerp or Hamburg having a large quantity of various things on board of her. I think there was some $20,000 on board of her. The case was stopped for the express purpose of ascertaining what the damage was, and the court then said that that was the best way of ascertaining it, sell by public auction.

The COURT: Overrule the objection.

Mr. TOWLE: Save an exception.

Mr. ANDROS:

Q. What were the articles that you sold in a damaged condition from the steamer "Queen of the Pacific," that belonged to, or were marked "Hellman, Haas & Co."?

A. They were marked "H. H. & Co." Are those the ones you want?

Q. Yes, what were they?

A. They were 420 mats of rice, 400 sacks of rice, 250 kegs of nails.

Mr. TOWLE: This is all understood to be subject to the objection?

107 The COURT: Yes, sir.

The WITNESS: 20 packages of tea; 13 boxes of drugs; 10 cases chow-chow; 25 cases pickles; 50 cases asparagus; 10 cases of

Lucca oil; 250 barrels sugar; 100 half barrels sugar; 3 barrels currants. That is all.

Mr. ANDROS:

Q. Did you, at the time of this sale, or about that time, notice the condition which the packages were in, with reference to being wet?
A. I don't remember, it is so long ago. The goods were damaged; that I remember very distinctly.
Q. What did these articles bring; what was the gross sale?

Mr. TOWLE: We object to that as irrelevant, immaterial, incompetent, and not tending to prove the damage to the goods.
The COURT: Overrule the objection.
Mr. TOWLE: Exception.

A. The gross sales were $1,262.20.

Mr. ANDROS:

Q. What was the net?
A. $1,190.09.

Cross-examination.

Mr. TOWLE:

Q. You made no examination of this merchandise before selling?
A. If I remember right I went to the wharf the day of the sale, and I saw the goods, but I can't remember the exact condition of the goods.
Q. You didn't open any packages?
A. No; I didn't open any packages.
Q. Take 13 boxes of drugs there, Florida water; are you familiar with that article?
108 A. No, not particularly.
Q. Do you know the manner in which it is put up?
A. Yes, it is generally put up one and two dozen in a case.
Q. In bottles?
A. 12 or 24 bottles.
Q. Would that Florida water be damaged, do you think, by immersing a bottle in salt water?
A. It would be damaged as far as making a marketable article of it.
Q. The merchandise itself would not be damaged?
A. I don't suppose the Florida water itself would be if the corks had not rotted.
Q. A new label would restore its marketable value?
A. That and new packages.
Q. Take 25 cases of pickles; do you know how those pickles were put up?
A. I couldn't tell you, no, sir.
Q. They must be either in kegs or barrels or bottles.
A. I should judge they were put up in glasses.

Q. A new label and packing and case would restore those to their original value, wouldn't they?

A. If they were not broken.

Q. But I mean so far as damage from the case being immersed in salt water?

A. I suppose so.

Q. That would be restored by a new case and label and packing?

A. Yes, sir.

Q. Take the asparagus referred to, 50 cases of asparagus. The same would be true with reference to that, wouldn't it?

A. I don't suppose it would because it would rust the tins.

109 Q. Would it rust the tins to such an extent as to destroy the market value of the merchandise?

A. Yes, sir; it would.

Q. Is that a mere estimate of yours, or is it based upon observation?

A. It is based upon observation.

Q. In this particular case?

A. No, sir.

Q. You don't remember seeing any rusty tin of asparagus?

A. No, sir.

Q. Take the Lucca oil; merely immersing a case of that in salt water would not injure the oil?

A. I don't think it would injure the oil if the corks were not damaged.

Q. A new label and a new case would restore that. Can you fix the date at which this merchandise was turned over to you by Hellman, Haas & Co.?

A. I can fix the day of sale.

Q. Can you fix the date at which you were instructed to sell?

A. No, sir; I could not.

Q. What was the date of the sale?

A. May 19th, 1888.

Q. It must have been turned over to you some days before that?

A. Yes, sir; I suppose it was.

Q. Do you remember how much advertising you did?

A. No, sir.

Q. Was it advertised at all?

A. Yes, sir; it was.

Q. In what paper?

A. I suppose the "Chronicle." In fact, I know it was the "Chronicle," because that was the paper that we used as our regular medium of advertising at that time.

Q. How long do you think?

A. That I couldn't tell you

110 Q. What would be your best estimate?

A. Well, we generally advertised from two to five days' sales at that time.

Q. Are you able to state the date upon which you made return of sale to Hellman, Haas & Co.?

A. Yes, sir.

Q. What date was that?
A. I can't give that from memory.
Q. The sale was the 19th, you say?
A. The sale was the 19th of May.
Q. The return of sales would be made in ordinary course when?
A. I have a receipt for sales. I didn't take any note of it.
Q. The next day?
A. No, sir; I think they were paid on the 28th of May.
Q. You think the settlement was on the 28th?
A. I think it was. However, if it was necessary, I could produce the receipt book and tell you the exact date. After the sale was made we paid at any time, generally at any time after five days after the sale.
Q. You could have furnished Hellman, Haas & Co. a statement of the amount of the sales the next day after the sale was made?
A. I don't understand the question.
Q. If Hellman, Haas & Co. had applied to you for the information, you could have stated to them the price received on the 20th?
A. Yes, sir; we could.
Q. Probably on the afternoon of the 19th?
A. We could give them the amount of the goods that was
111 bought, and the supposition is the goods were delivered that same day.
Q. It was a cash sale?
A. Yes, sir.
Q. Upon delivery?
A. Yes, sir; and delivered before dark that day.
Q. It is a fact, is it not, Mr. Newhall, that goods seldom realize at auction as much as they realize at private sale?
A. Oh, seldom.
Q. If you had taken this same lot of goods before they were shipped, put them up at auction and sold them in the same way that you did, you would not anticipate that you would realize as much for them as would be obtained at a private sale in the ordinary course of business?
A. No; we would not.
Q. Have you in the office a memorandum which would show the date that you were instructed to sell this merchandise?
A. No, sir.
Q. Nothing?
A. No, I have nothing at all that I could put my hand on to show.
Q. Did the instructions come in writing, or verbally?
A. I couldn't tell you.

Redirect examination.

Mr. ANDROS:

Q. You spoke of goods that were in good order bringing less at public auction than they would at private sale. Does not
112 that arise from the fact that goods when they are sold at auction are generally sold under some suspicion as to quality?

A. They generally have a little grain of suspicion.
Q. In other words, it gives them a sort of black eye, doesn't it?
A. Well, yes, sir.
Q. Do you know any instances where damaged goods were sold, and really brought more than they were worth?

Mr. TOWLE: We object to that.
Mr. ANDROS: You opened the door.
Mr. TOWLE: I want to know what he knows.

Mr. ANDROS:

Q. Do you know of such instances?
A. Yes, sir; where they have sold for more than they would have brought at private sale in the open market.

Mr. TOWLE:

Q. That occurrence was so isolated as to be well remembered, was it not?
A. Yes, it don't occur very often, or it did not occur very often.
Q. My question was based on the hypothesis that goods were in good order; suppose the merchandise of a grocery store, for instance, a party got in failing circumstances and his merchandise was put under the hammer; your experience as an auctioneer would not lead you to expect to realize the market rates for that merchandise?
A. It would not.

(A recess was here taken until 2 o'clock p. m.)

113 *Afternoon Session.*

Mr. ANDROS: If your honor please, there is an allegation in the answer here which puts me in somewhat embarrassing position professionally. I do not now recollect that I ever offered myself as a witness in a case where I was of counsel for either party. But, in view of the allegation to which I refer, and as I am the only person, so far as I know, who can be reached and who knows anything with reference to that allegation, I do not see how I can escape from that position. The allegation is this: "Denies, that at the time said libel was filed, said steamship was in the northern district of California, and in that behalf alleges that when said libel on said steamship was filed, and for four days continuously theretofore, said steamship remained without said northern district of California." I know when said libel was filed, and I know when it was sworn to. I do not know but what Mr. Towle might agree that I should testify to certain facts, and with that end in view, I will make a statement of what I should testify to. I dislike very much to be sworn as a witness in a case where I am counsel. It is a thing that I do not recollect of ever having done. I will state that I have made inquiries to see if I could find the gentleman who swore to the libel, the treasurer of the Bancroft-Whitney Company, and I found that he was in Europe. I also made a search in the marshal's office. The libel was filed during Marshal Long's term of office, and I find

there is nothing on the record to show who the deputy who
114 searched for the vessel was. The facts to which I will testify are these. After I have given them, I can be sworn as a witness, if Mr. Towle so desires, and it can be deemed that I have so testified.

At the time the libel was filed, I knew that four years was about to elapse, and would probably elapse on midnight on the 28th of April, and therefore there was no time to lose. I knew that the ship had been at Sausalito, and I supposed she was then at Sausalito. On the morning of the 28th of April, 1892, on my way from my house to my office, I stopped at the Bancroft-Whitney Company's, and I do not think it could have been later than half past eight o'clock. I there got Mr. Sanborn, the treasurer, to go with me down to the office of Mr. Knox, the notary public, to swear to the libel. I did that because I believed the clerk's office would not be open at so early an hour. The libel was sworn to by Mr. Sanborn as treasurer of the company, before Mr. Knox, notary public. I then went immediately—and when I say immediately, I do not know that I went directly, though I think I did—over to Gutte & Frank's, and got Mr. Gutte and another gentleman there to act as sureties. I think it was somewhat later, and that I did not go directly there, but first went to my office. At any rate, at before ten o'clock that day, I went down there and procured the attendance of Mr. Gutte and the other gentleman here as sureties on the bond for costs. As soon as that was executed, the process was issued and put immediately into the hands of the marshal. Whether I delivered it to him personally or not, I do not now recollect, but I do recollect in-
structing him to go to Sausalito and seize that vessel, because
115 she was there. The marshal came back, and some time in the afternoon I learned that he had not found the vessel there, but that she had been brought over to the city, and that he had gone down to the city front and found that she had sailed between two and three o'clock—or about two o'clock. Of the fact that the libel was filed before eleven o'clock on that day, I am morally sure, because I did it myself. I recollect the circumstance particularly, because I stopped in at Bancroft-Whitney Company's on my way from my house to my office, and got Mr. Sanborn to go to Mr. Knox with me to swear to the libel, because I did not believe that the clerk's office would be open at that time in the morning, and I wanted to make as much speed in the matter as I could.

If Mr. Towle is willing to accept that as the statement I would give if I were sworn as a witness in the case, it will not be necessary for me to be sworn.

Mr. Towle: I will accept it with the exception of the fact that I think Mr. Andros is misinformed as to the sailing time of the steamer. I think she sailed at eleven o'clock.

The Court: You admit that Mr. Andros would swear to the facts which he has stated, if he were called to the stand as a witness?

Mr. Towle: Certainly.

Mr. Andros: I think the answer specifies that she sailed at two o'clock.

Mr. TOWLE: That was on this particular trip.

Mr. ANDROS: That is true; I was mistaken about that.
116 However, I will state that as soon as I thought the office was open here, I came down and filed the libel.

Mr. TOWLE: There is no evidence as to the hour of the sailing. I am perfectly willing, if your honor please, to admit that Mr. Andros will swear to the facts as he has narrated them, if he were called to the stand. I do not care to have counsel sworn to make a statement. But by admitting that Mr. Andros would so testify, I do not wish to be understood as admitting that the vessel was within the district at the time the libel was filed.

Mr. ANDROS: That is understood. I have no objection to taking the stand as a witness except from my position as counsel; that is all.

The COURT: You had present in your mind at that time the requirements of the rule of law upon that subject, I presume?

Mr. ANDROS: Yes, and also the fact that the four years was so nearly up, whatever figure that might cut in it that the four years would expire that day. All the other libels had been sworn to previously, and some of them in the southern part of the country as well as here. In fact, they were sworn to by notaries going around and taking their affidavits at their place of business. This particular one was sworn to last, and was then put ahead of all the others, although the others had been sworn to some time before it.

Mr. TOWLE: Can you fix the time at which the libel was filed?

Mr. ANDROS: As near as I can now recollect, I would be willing to say that it was not later than ten o'clock in the morning.
117 As soon as I got the sureties, I came down here.

If your honor please, under the pleadings in this case, that is our case, and we rest.

Mr. TOWLE: I do not know exactly what the practice is in this court with reference to what in the State courts would be denominated motions for nonsuit in this class of cases. But we are now ready to move for a nonsuit in this case, upon the following grounds: First, that it does not appear that the vessel was within the district at the time the libel was filed, and therefore that the court was without jurisdiction in this matter at the inception thereof. Second, that this action is based upon a contract which is set forth and made a part of the pleadings, and that that contract provides that no suit of this character can be upheld, unless suit be brought within thirty days from its date, or rather, unless claim is first made and then suit brought. There is no allegation in the libel that a claim was made, nor is there any proof that the claim was made, within thirty days. It appears that suit was not commenced until the last day before the expiration of four years from the date the contract was entered into. I am aware that those contracts have been held to be questionable, depending on the reasonableness of the contract in a particular case. If I remember rightly, your honor, when the question was raised before, suggested that that was the case. It appears now that the parties had notice of the damage two days after the contract was entered into, which

would give them twenty-eight days within which to present
118 their claim. It also appears that at some time prior to the 19th day of May (how long prior does not appear) the agent of Hellman, Haas & Company saw this merchandise on the wharf here in its damaged condition. It also appears that the merchandise was sold on the 19th day of May, which would be nineteen days subsequent to the time the contract was entered into. It therefore appears that, upon their theory as to what evidence was necessary to enable them to make a claim for loss, they were in a situation to have knowledge of that fact and of the extent of their loss on the 20th day of May, at the very latest. It appears that the libelants are residents of San Francisco, and that the facts were all known here. The Pacific Coast Steamship Company is a resident of San Francisco. In other words, they had ample time, under the facts in this case, and were possessed of all the knowledge, on the 20th day of May, 1888, of which they are possessed today with reference to this merchandise, the loss, if any, which it sustained and the extent of that loss, so that there is no reason apparent why the clause of this contract which they had alleged, and having alleged it is a contract existing between these people and themselves under which these services were to be rendered, as part of their libel, nothing appears to excuse them, or which will operate as a legal excuse, why they should not have lived up to the terms of that contract.

The COURT: You say there is no allegation in the libel that they made a claim at all?

Mr. TOWLE: There is no allegation, nor is there any proof
119 of it either. And I say there is nothing, so far as the facts of this case disclose, to legally excuse them for not having lived up to the terms of the contract. That would be if they are in a condition to question the contract, which I claim they are not, by reason of their having alleged it as a contract. There are cases, I am aware, which hold that with this sort of a clause, where it is found in a printed form which appears to have been used by the public generally and accepted by the public without protest, is presumptively valid. And that is the fact, so far as appears here. Counsel in his opening statement stated that this was the ordinary course of business. There are in this case some forty or more of these things presented, all of the same general tenor. The decisions, and one of them, I think, of the circuit court of appeals, have held that where this clause appeared in a printed form which appeared to have gone into general use and been accepted by the community without question, the clause was presumptively valid, and the burden of proof is on the party undertaking to contest it, to show that it is unreasonable in fact. There are other decisions which say that where a complaint sets out one of these contracts, and fails to allege either generally that the party has performed all the conditions on his part to be performed, or specifically that the performance was had in particular, the complaint is demurrable for failure to state facts, because it fails to show the very condition which is made a condition precedent to the maintenance of an action upon the con-

tract. There is still another class of cases which hold that the question whether it is reasonable or unreasonable in a given case, is a question for the jury, or, in this case, a question for the
120 court to pass upon; whether any fact under the contract, or what had transpired under it could be used to recoup a benefit which the plaintiff was entitled to, after he had claimed the benefit of the contract; for instance, whether he had lost his right, whether the reasonable time within which he could make a claim under the circumstances, had elapsed, prior to the time that he was given to appear and make a claim. In this case it affirmatively appears that the party was in full possession of all the facts connected with this merchandise, eight days prior to the expiration of his thirty days, and it does not appear that any claim was made, nor does it appear that this suit was commenced until the last day of four years after the contract was entered into.

The COURT: Have the courts decided concerning whether or not the clause is void by reason of its being unreasonable?

Mr. TOWLE: In those cases if your honor please, where the question has arisen as to the reasonableness of this contract, so far as I am informed they arose where the contract and stipulation was set up as a defense; not plead in the first instance. But that is not this case. If they had come into court simply upon the shipment and the loss, and we had then come in and set up this contract, they would clearly have been in a situation to raise the question as to the reasonableness of this particular stipulation of that contract. But they can no more dispute the reasonableness of their own allegation in this case, than they can dispute any other affirmative allegation of their libel. When a party pleads a contract or claims the benefit of a contract, he must take it with not
121 only those provisions that are beneficial to him, but with the burden of those which are burdensome to him. And when a party claims a contract by bringing suit upon it, he is estopped to question the validity of that contract in all its parts. (Counsel cites and comments upon a case.)

Another reason why to ask for a nonsuit is that the libel alleges that this merchandise was damaged from sea water, which, through the neglect of the steamship company, its servants, etc., gained access to the vessel. All that appears up to this time is that the merchandise was wet with sea water. There has been nothing so far to show negligence on the part of any one. (Counsel reads from contract.) Damage by sea water is, of course, a peril of the sea. Peril of the sea, one of the excepted clauses being shown, or the damage being shown to have resulted from that cause, the burden of proof shifts. While up to that point the burden is on the claimant to show that this damage did result from one of the excepted causes, peril of the sea, or accident to navigation, or an accident of some character, when that is shown, under the decisions of the Supreme Court of the United States, the burden shifts, and that which was before upon the claimant is shifted to the libelant; that is, negligence on the part of the carrier is a fact to be proven by the libelant. I say that in this case damage by sea water is a peril of the sea.

How that damage occurs is the fact which shall determine where responsibility for it rests. And when you have simply said "damage by sea water," you have a contract which excuses
122 the carrier from damages from perils of the sea, then I say the carrier stands excused by reason of that fact, nothing more appearing, and that then the one claiming that the damage is the result of negligence, although it may be so, has the burden shifted on him to show that negligence. It is upon that theory, as I take it, that this libel is drawn, because the libelant has not said simply that this merchandise was damaged, or damaged by sea water, but he has said that it was damaged by sea water by reason of the negligence of these people, thereby taking upon himself in the charging part of his libel the affirmative proposition of showing neglect. He must of course do that when he alleges that it was damaged by sea water. So we say here that there is no proof upon this point. And the authorities go to the proposition that when it is left in doubt, whether the damage might have resulted from neglect or not—in other words, when negligence can be affirmatively shown by a preponderance of evidence, then the claimant must give over. As I say, the libelant alleges here that this merchandise was damaged by sea water, which through neglect of the officers and servants, etc., gained access. There is no proof whatever on the question of neglect; nothing whatever to show it. Therefore we say that upon that ground, too, no case has been made. We also claim that there is no proof here upon which this court can find damages in any particular amount. That question was raised by the exceptions, and we will not discuss it. But we submit that no case has been made by the libelant so far which devolves upon the claimant the necessity of introducing any testimony in the case at all.

123 Mr. ANDROS: May it please your honor, in regard to the first proposition, the thirty-day clause, I will read it, so that we may start out clearly and find out towards what point we are actually navigating: "It is expressly agreed that all claims against the Pacific Coast Steamship Company, or any of the stockholders of said company for damage to or loss of any of the within merchandise, must be presented to the company within thirty days from the date hereof, and that after thirty days from the date hereof, no action, suit, or proceeding in any court of justice shall be brought against the Pacific Coast Steamship Company or any of the stockholders thereof, for any damage or loss to said merchandise; and that the lapse of said thirty days shall be deemed a conclusive bar and release of all right to recover against the company, or any of the stockholders thereof, for any such loss or damage."

This question was directly passed upon, as my memory serves me, in your honor's opinion in deciding the exceptions which were raised. Without now discussing it, your honor intimated that you did not exactly decide that thirty days was an unreasonable time. Counsel says we knew within two days after the vessel's sinking, that it had sunk. We did not know our damage, nor did we know anything at all about it until the goods got back here. The amount

of the damage could not be ascertained until the 19th day of May, so that it would leave about nine days of the limitation of time, and would be precisely the same as though they had said that unless a suit was brought within nine or ten days after the extent
124 of the damage shall be ascertained, the right to bring suit would have lapsed. When counsel says that the claim must be presented within thirty days, or no suit shall be brought after that time, we had the right, without presenting any claim, to present our claim by our libel, if we chose to do so, even if the thirty days had expired. The bringing of an action would have been sufficient, because then the claim would have been asserted, and the answer to the suit would have been a sufficient claim, and have brought both within that category. But that is not this case. This case is not a suit against the Pacific Coast Steamship Company, nor is the suit against any of its stockholders. This is a proceeding *in rem*, to enforce a maritime lien against this ship. We are not suing the stockholders, and we are not suing the company; we are making a claim against the living *res*, and whether anybody will ever come in and defend that suit or not, we do not know and cannot know, at the time of filing the libel. If we had brought an action *in personam*, then the argument of counsel might have some application, though to what extent I do not know, because then it might perhaps be governed by the thirty days' clause, whether reasonable or unreasonable, but this is not a proceeding *in personam*, but is a proceeding, as I have stated, against the living *res*. The *res* is the defendant in this case, and until somebody comes in and claims her and puts in a bond and stands in the place of the *res*, there is no other party in court, and cannot be. The stockholders are not here, the company itself is not here. The company itself is not summoned in, except in that per-
125 functory way in which all persons who have any right, title, or interest in the *res* are asked to come into court and defend, and when they do come in and defend, they then, so far as the living *res* is concerned, are parties to the suit, because the *res* cannot speak for itself, and has to have a mouthpiece, which mouthpiece is the claimant, whoever he may be. However, I do not propose to elaborate upon this point, because I understand it to have been ruled upon by your honor heretofore.

The next point made by counsel is that there is an allegation in the libel of neglect, which he says we have not proved. I reply that it is not necessary for us to prove it. The law presumes neglect until the claimant has excused himself by saying that it came within one of the excepted clauses in the bill of lading. (Counsel cites and reads from Clark *v.* Barnwall, 12 Howard, 272.)

It is argued here that the fact that the goods are alleged to have been damaged by sea water, shows that they were damaged by a peril of the sea. We respectfully submit that it does not show anything of the sort. Suppose the ship has been unseaworthy and had leaked, and the goods been damaged by sea water; would that have been a peril of the sea? Suppose that by some neglect on the part of the master or some other officer, or some of the crew of the ship,

sea water had been permitted to get into her. Would that necessarily be a peril of the sea? The important factor is the cause, the approximate cause of it. That is what we are to look at. If the approximate cause was a peril of the sea, then it would follow that the damage by sea water came in under an excepted clause.

126 But the fact that sea water got into the ship does not prove that it got in there through the peril of the ship, because sea water gets into a ship in a variety of ways, or from a variety of causes. It may come in because the ship is overladen, or because she is unseaworthy, or from any one of a great variety of causes. A sea peril is an overwhelming emergency against which human skill and foresight cannot avail (counsel cites and comments upon cases).

In every case where an action has been brought against a ship for damage to the cargo by water getting into her, the courts have called upon the libelee to show that it arose by a peril of the sea. If the decks of a vessel leak and water gets through them, they could not answer that it was a peril of the sea because she leaked. That is not enough. It is a peril of the sea, if the vessel is a stout, staunch vessel, fitted to encounter all the excepted perils and all the vicissitudes of wind and sea and water on the voyage for which she sailed, she encountered a peril which human foresight could not anticipate, and for that reason leaked. But they must show that there was something extra. It is upon them, *in limine*, to show it was something extra. The libelant has made out his case when he has proved that the goods were wet with salt water. The claimant has not done what was agreed. It agreed to deliver them at the place of consignment, perils of the sea excepted. The goods come back wet and damaged with salt water. Is that evidence of a peril of the sea? It is evidence that they were damaged and evidence that the contract was broken. And, *prima facie*, the burden

127 is on the carrier to show that it was brought about by unexpected perils, by perils which the ship, although she was tight and staunch and strong, were such that they could not reasonably have been anticipated, and that as to those which could have been reasonably anticipated, she was reasonably seaworthy. When that is shown, they have shown a peril of the sea. The bare fact of the damage being done does not prove that it was done by a sea peril. It only proves that sea water did it. And to exculpate themselves, they must bring themselves within a peril of the sea affirmatively. The libelant's case is made when the damage is shown.

Counsel for the claimant replied to the argument of counsel for the libelant, citing cases.

The COURT: I think I shall have to look into the question before I can pass upon the motion. I am not in a position to decide the question now. If you have any testimony that you desire to introduce, Mr. Towle, I will overrule the objection provisionally, and take the testimony.

Mr. TOWLE: I prefer to have a ruling before I proceed.

The COURT: Very well. I shall have to take time to look into these authorities.

Mr. ANDROS: If your honor is going to take time to examine this matter, there are some questions which might as well be examined at the same time.

The COURT: Mr. Towle desires a ruling before we proceed, and I will only look into this matter now. I am not quite clear upon the matter at this moment.

Mr. ANDROS: There are some further cases I would like to cite to your honor, then.

128 Mr. TOWLE: Suppose we each take one day for the citation of authorities.

Mr. ANDROS: That is satisfactory to me. I will furnish my authorities tomorrow morning.

The COURT: Very well. The case will be continued until Tuesday morning, May 12, 1896, at 11 o'clock a. m.

(Endorsed:) Filed May 9th, 1896. Southard Hoffman, clerk.

(Style of Court and Title of Cause.)

Opinion.

(On motion for judgment in favor of claimant.)

Geo. W. Towle, Esq., for motion.
Messrs. Andros & Frank, *contra.*

MORROW, *District Judge:*

This case coming on for hearing and the libelants having rested their case, proctor for claimant moved the court for judgment in his favor on several grounds, which are as follows: (1) That the testimony does not show that the steamship was within the northern district of California when the libel was filed; (2) that there is no testimony that claims for the damages complained of to the goods shipped on board the "Queen of the Pacific" were filed or presented to the steamship company within 30 days from the date of the shipping receipts, in compliance with the stipulation to that ef-

129 fect contained in the receipts; and (3) that there is no testimony tending to show that the damage complained — was occasioned by the negligence of the carrier.

Taking these questions up in their order, and very briefly, it may be said that I do not think the first point is well taken. There is testimony tending to establish the fact that the steamship was within the jurisdiction of the court when the libel was filed.

The second point was disposed of on the exceptions heretofore raised to the sufficiency of the allegations of the libel. I then held that a provision in the shipping receipts that all claims against the steamship company or any of its stockholders for damage to the goods must be presented within 30 days from the date thereof, as a condition precedent to maintaining a suit against such company or its stockholders, did not cover or affect the right to maintain a suit *in rem* against the ship; and I held, further, that the period of 30

days, assuming that such provision did apply to proceedings *in rem* against the vessel was unreasonably short and, therefore, void, as against public policy. See The Queen of the Pacific, 61 Fed. R., 213, 217. This, therefore, must be accepted as the law of the case.

With respect to the third point, the averments of the libel and the denials and admissions and averments of the answer are important. The libels allege that the goods, claimed to have been damaged, were shipped in good order and condition on board the steamship "Queen of the Pacific," at the port of San Francisco, for transportation to the port of San Diego, California; that
130 thereafter said steamship sailed from the port of San Francisco with said goods on board bound for said port of San Diego; that said merchandise was never delivered at the port of San Diego but was subsequently returned to the port of San Francisco, in a greatly damaged condition, by reason of having been wet with sea water during said voyage, which, by reason of the negligence of said steamship company, its officers and servants, gained access to the interior of said ship, where said merchandise was stowed. The answer admits that said merchandise was damaged by reason of having been wet with sea water, and that it was not delivered at San Diego but was returned to San Francisco, but denies that the same was so wet with sea water during said voyage or by reason of the negligence of said steamship company, its officers and servants, or either of them, and denies that by reason of such, or any such negligence, sea water, or any water, gained access to the interior of said ship where said merchandise was stowed. As a further and separate defense and answer, the claimant alleges, substantially, that the said steamship was, when she sailed from the port of San Francisco, stout, staunch, strong and in every respect seaworthy, completely manned, officered and equipped for her then intended voyage; that she left San Francisco on April 29, 1888, at about 2 o'clock p. m., and proceeded down the bay out through the Golden Gate across the bar, and on her course in a southerly direction with a fresh northwest wind blowing and a northwest chop sea; that no unusual incident was known to occur during said 29th of April, 1888; that about one o'clock a. m., of the 30th day of April, said steamship was noticed to have a slight list to
131 starboard; that efforts were then made to correct such list by shifting freight to port in the between-decks and burning coal mostly from the starboard bunkers; that about 2.15 or 2.30 o'clock, a. m., of Monday, April 30, water was discovered to be dropping from a point in the iron bulkhead on the starboard side of the engine-room, and about 6 or 8 inches above the deck of the alleyway in the between-decks of the vessel; that examination then made resulted in water being found in the between-decks of the steamship aft, such water extending about half way from the side of the ship to the hatch coamings, but the aperture through which such water entered the vessel could not after diligent search for the same, be discovered; that seamen were put to work passing such water down the hatches into the hold so as to bring it within reach of the bilge pumps and such pumps were kept in operation, not-

withstanding which the water steadily increased between-decks, and the list of the vessel became so great that about the hour of 5 o'clock, a. m., it was deemed by the master of said vessel prudent to make for Port Harford with all convenient speed, which was done, and the said vessel at about the hour of seven o'clock, a. m., of said 30th day of April, 1888, was run upon the beach at said Port Harford at which place sea water immediately came in over her deck, and nearly filled the vessel with water, and thereby said merchandise became wet with sea water; that the beaching of said steamship was necessary to prevent, and avoid, a total loss of said steamship and of all the said merchandise then on board of her, and was done by the master thereof as the result of cool deliberation,
and in the exercise of a wise discretion on his part as to what
132 was best to be done, and with the purpose of saving said vessel and cargo and of rendering entirely safe the lives of all the persons, passengers and crew, two hundred and twelve in number, then on board of said steamship. In this state of the pleadings, the following salient facts may be deemed established: (1.) That the libelant's merchandise was shipped under the contract of affreightment or shipping receipts, as they are termed, annexed to the libel; (2.) That the merchandise was never delivered at the port of destination; (3.) That it was returned to San Francisco and delivered to the shippers in a damaged condition; (4.) That this damage was by reason of being wet with sea water; (5.) That the fact that the vessel was leaking was discovered about eleven hours after the steamer sailed from San Francisco; (6.) That the leak increased to such an extent that the vessel was compelled to put into Port Harford and was there beached, about seventeen hours after sailing from San Francisco. It may be observed, also, that there is a general denial that the merchandise was shipped in good order and condition. The following omissions in the answer are significant in connection with the other averments and denials and the established facts: (1.) It does not appear from the answer what caused the ship to spring a leak; (2.) There is no averment that the vessel, after sailing from San Francisco, and before the leak was discovered, encountered any stress of wind or weather to which the leak could be reasonably, or at all, attributed; (3.) There is no averment in the answer that the cause of the damage was from a
peril of the seas or any other unavoidable accident.
133 Such being the state of facts as disclosed by the pleadings, proctor for libelants contented himself with introducing the shipping receipts as evidence of the apparent good order and condition of the goods when delivered to the carrier for shipment. Bills of lading afford *prima facie* evidence that the merchandise was shipped in good order. Zerega *v.* Poppe, 1 Abb., 397; Nelson *v.* Woodruff, 1 Black, 156; Turner *v.* The Black Warrior, McAll., 131; The Zone, 2 Sprague, 19; Seller *v.* The Pacific, Oreg., 409. He also introduced testimony respecting the damaged state, when returned to San Francisco, of one of the shipments, and the further fact that the goods comprising that shipment realized less than they would have brought had they been returned in good order and con-

dition. No testimony has, as yet, been introduced with reference to the other shipments set out in the libel, some 37 in number, the parties having probably arrived at some understanding by which the remaining claims will abide by the decision of the claim above referred to. The libelants then rested their case upon the admitted facts as stated and the supplementary proof referred to. Thereupon, proctor for claimant moved for a judgment in his favor, and, in support of his motion, contends that the libelants have failed to show that the merchandise was damaged through the negligence of the steamship company, its officers and servants, and that they must first do this before the burden of proof is shifted on the carrier. It is contended that the admitted and proved facts simply tend to prove one issue, viz: that the merchandise was damaged by sea water. That being so, and the presumption being, as claimed
134 by counsel for claimant, that the vessel was seaworthy, it is urged that the further presumption arises that the damage must have been occasioned by a peril of the sea, from the consequences of which the carrier is absolved by a clause in the shipping receipt or contract of affreightment, and that, therefore, the burden of proof is upon the libelant first to prove affirmatively negligence on the part of the carrier before the latter is called upon to put in his defense. On the other hand, the libelants claim that they have made out a *prima facie* case of negligence, when they show that the merchandise was shipped in apparent good order and condition; that it was never delivered but, on the contrary, was returned to the shippers in a damaged state, and that that damage was caused by sea water, which arose while the merchandise was in the possession and under the control of the carrier on board of his vessel. The rule of law as to the burden of proof, in this class of cases, is clearly and well stated by Mr. Justice Nelson in Clark *et al. v.* Barnwall *et al.*, 12 How., 272, as follows: "After the damage to the goods, therefore, has been established, the burden lies upon the respondents to show, that it was occasioned by one of the perils from which they were exempted by the bill of lading, and, even where evidence has been thus given bringing the particular loss or damage within one of the dangers or accidents of the navigation, it is still competent for the shippers to show, that it might have been avoided by the exercise of reasonable skill and attention on the part of the persons employed in the conveyance of the goods; for, then, it is not deemed to be, in the sense of the law, such a loss as will exempt the carrier from liability,
135 but rather a loss occasioned by his negligence, and inattention to his duty. Hence it is, that although the loss occurred by a peril of the sea, yet if it might have been avoided by skill and diligence at the time, the carrier is liable. But in this stage and posture of the case, the burden is upon the plaintiff to establish the negligence, as the affirmative lies upon him." In other words, the rule is, that when the merchandise has been delivered in apparent good order to the carrier and he delivers it to the consignee at the port of destination, or, as in this case, returns the goods to the shipper, in a damaged condition, the presumption of law arises,

upon proof of delivery of the goods to the carrier in apparent good condition and proof of damage to them, that it was in consequence of the negligence of the carrier, and the burden of proof of showing that the damage arose by one of the perils of the seas excepted in the contract of affreightment, or in some manner other than through the negligence of the carrier, is then cast upon the latter, and when he has done this, the shipper or consignee still has an opportunity to show, in rebuttal, that although the loss or damage occurred through a peril of the sea, still it might have been avoided, had the carrier used due skill, care, and diligence. This rule appears to me just, logical, and reasonable, and is constantly followed in cases of this character. Rich *et al. v.* Lambert *et al.*, 12 How., 347; The Howard *v.* Wiseman, 18 How., 231; Propeller Niagara *v.* Cordes, 21 How., 29; Nelson *v.* Woodruff, 1 Black., 160; The Commander-in-chief, 1 Wall., 51; The Maggie Hammond, 9 Wall., 459; Transportation Co. *v.* Downer, 11 Wall., 134; The Delaware, 14
136 Wall., 597; Hunt *v.* Propeller Cleveland, 6 McLean, 76; Lewis *v.* Smith, 107 Mass., 334, 338; Hooper *et al. v.* Rathbone *et al.*, Taney's Dec., 519, 528; The Mascotte, 2 C. C. A., 399; Hastings *v.* Pepper, 11 Pick., 43; The E. M. Morton, 15 Fed. R., 686, 689; The Falcon, 3 Blatch., 64; Bierce *v.* Ropes, 1 Sprague, 331; The Compta, 4 Sawy., 375, 377; The Giglio *v.* The Britannia, 31 Fed. R., 432; The Lydian Monarch, 23 Fed. R., 298.

In the case at bar, under this rule, the presumption of negligence on the part of the carrier growing out of the admitted facts in connection with the proof of delivery of the merchandise to the carrier in apparent good order, and its return to the shipper in a damaged condition, relieves the libelants from any further proof of the carrier's negligence until the carrier rebuts this presumption of negligence which the law raises against him by proofs of facts sufficient to bring the cause of damage within the perils and accidents excepted in the bill of lading.

It is, however, contended on behalf of the carrier, that the presumption is, that the vessel was seaworthy and, in the absence of any affirmative proof by libelants of negligence on the part of the carrier, the mere fact that the merchandise was damaged by sea water does not create a presumption of negligence on the part of the carrier but rather gives rise to a presumption that such damage must have been caused by a peril of the sea. But I do not think that the mere fact that the libelant's merchandise was wet and damaged by sea water, which gained access to the ship, necessarily raises any presumption that it was occasioned by perils or accidents of the sea, or any acci-
137 dent at all, within the meaning of the contract of affreightment. For, if this were so, then in every case where such damage arises, the libelant would be called upon to prove a negative, that is, that it was not the result of sea perils or of accidents, which, it is obvious, he can rarely ever do. Indeed, it is difficult to see what part the presumption of seaworthiness of the vessel can play, to prevent the burden of proof from shifting to the carrier after the libelant has made out a *prima facie* case of negligence. It

is manifest that a mere presumption of seaworthiness, at such a stage of the case, proves, of itself, nothing; for it can well be that a vessel may be perfectly seaworthy and yet through some carelessness or negligence on the part of the carrier, goods laden on board may suffer damage. But, under the admitted facts, I do not see how the carrier can be entitled to the presumption that his vessel was seaworthy; on the contrary, the facts made by the pleadings in this case seem to justify a presumption of unseaworthiness. Here is a strong, stout, staunch and in every respect seaworthy vessel, as alleged in the answer. She is said to have been fully and completely manned, officered and equipped for her then intended voyage. She was engaged in the coasting trade and carried, on the particular voyage in question, 212 persons, passengers and crew, besides her cargo. She meets with no unusual or boisterous weather; she encounters no storms or other perils of the sea. After being out at sea only eleven hours, a slight list to starboard is observed. Efforts are immediately made to correct this list. Shortly after, water is discovered to be dropping from a point in the iron bulkhead on the starboard side of the engine-room, and about
138 6 or 8 inches above the deck of the alleyway in the between-decks of the vessel. Careful examination being made, water is found in the between-decks of the steamship aft, such water extending about half way from the side of the ship to the hatch coamings, but the place of the leak could not be ascertained. The pumps are employed, but notwithstanding the water gains steadily in the between-decks and the list of the vessel becomes so great that at about 5 o'clock a. m., of the 30th of April, or some four hours subsequent to discovering the list of the vessel, it was deemed prudent by the master to make for Port Harford with all convenient speed, and two hours thereafter, or about 7 o'clock, the steamship is run upon the beach at Port Harford, to prevent her from foundering and becoming a total loss and to render entirely safe the lives of all the passengers and crew. These facts appear from the allegations of the answer itself, and if they are not inconsistent with the presumption of seaworthiness of the steamship, and strongly indicative of unseaworthiness, they at least, in my opinion, are of sufficient weight to throw the burden of proof upon the carrier to show wherein and how the leak arose. A presumption of unseaworthiness has been predicated upon much less convincing facts than those adduced in the case at bar. In Work *v.* Leathers, 97 U. S., 379, the general proposition is laid down that "if a defect without any apparent cause be developed, it is to be presumed it existed when the service began." See, also, Talcott *v.* Com. Ins. Co., 2 Johns., 122, 129. In Cort *et al. v.* Delaware Ins. Co., 2 Wash., 375, Fed. Cas. 3257, Mr. Circuit Justice Washington, in charg-
139 ing a jury, in an action upon a policy of insurance on the schooner Triumph, said: "If a vessel, after she commences her voyage, becomes unfit to prosecute it, and has been exposed to no extraordinary perils of the sea, this circumstance may raise so strong a presumption of her having been unseaworthy at the time of her departure, as to call upon the insured to give strong evidence

to repel the presumption." In The Planter, 2 Woods, 490, Fed. Cas. 11207*a*, this significant language was employed: "Without having encountered any tempestuous weather, she suddenly sprung a leak within less than twenty hours after leaving port, so that her officers were compelled, in order to save her from sinking, to throw over more than one-third of her cargo. These facts raise the presumption that she was unseaworthy when she started, and throw on claimants the burden of proof to show that she was seaworthy." In 2 Pars. Mar. Law, 138, 139, the general rule in this respect is thus stated: "If the vessel springs a leak soon after sailing, without having met with any peril, this raises a presumption that she was unseaworthy when she sailed." And in 1 Arnould on Ins. (Am. ed.), 689–691, that author says: "Where a ship becomes so leaky or disabled as to be unable to proceed on her voyage soon after sailing on it, and this cannot be ascribed to any violent storm, or extraordinary perils of the seas, the fair and natural presumption is that it arose from causes existing before her setting out on her voyage, and consequently that she was not seaworthy when she sailed." See, to the same effect, the following authorities: Walsh *v.* Washington Ins. Co., 32 N. Y., 427, 436; Paddock *v.* Franklin Ins.
140 Co., 11 Pick., 227, 237; Patrick *v.* Hallet *et al.*, 3 Johns. Cas., 76; Higgie *et al. v.* American Lloyds, 14 Fed. R., 143; The Gulnare, 42 Fed. R., 861, and Marshall on Ins., 367.

I am of the opinion that while the libelants are very close to the border line which would entitle the carrier to a judgment in his favor on the ground that the libelants have failed to make out a *prima facie* case, still that they have, in connection with the admitted facts, established sufficient to throw the burden of proof upon the carrier. The motion for judgment in favor of claimant is, therefore, denied on each and every ground alleged.

(Endorsed:) Filed May 12th, 1896. Southard Hoffman, clerk, by J. S. Manley, deputy clerk.

(Style of Court and Title of Cause.)

Order Overruling Motion for Nonsuit.

In this cause the motion of claimant for a judgment in its favor on the testimony introduced by libelants having been submitted to the court for consideration and decision, now, after due consideration had thereon, the court renders its written opinion, and by the court ordered that said motion for a judgment in favor of claimant be, and the same is hereby denied. And to which order denying said motion, the claimant by its proctor then and there duly excepted.

The cause thereupon came on regularly for further hear-
141 ing, Milton Andros, Esq., and Nathan H. Frank, Esq., appearing as proctors for the libelant, and George W. Towle, Jr., Esq., as proctor for the claimant. And Mr. Towle called Abraham Haas, E. Alexander, Thomas R. Craigie, James Dickie, Frederick Barry, and Frank J. Crogan, who were duly sworn and

examined as witnesses on behalf of the claimant. And thereupon the further trial hereof was continued until Wednesday, May 13th, 1896.

Testimony Filed June 1st, 1896.

TUESDAY, *May* 12, 1896.

The court read a written decision denying the motion made by Mr. Towle on Tuesday last.

Mr. TOWLE: I will take an exception.

ABRAHAM HAAS, recalled for the respondent.

Mr. TOWLE:

Q. You are the same party who testified before on behalf of the libelant?

A. Yes, sir.

Q. And were at the time these goods were shipped, one of the firm of Hellman, Haas & Co.?

A. Yes, sir.

Q. The libelants in this case?

A. Yes, sir.

Q. The merchandise in this case was insured?

Mr. ANDROS: I object to that question as immaterial, incompetent, and irrelevant in every respect. It is perfectly immaterial whether they were insured or not. The claimant here has no interest in the insurance.

Mr. TOWLE: What I want to show by this witness is that
142 Hellman, Haas & Co. preferred a claim against the insurance company upon the basis of their merchandise having been lost by a peril of the sea, and received the amount of insurance from the insurance company in settlement of their claim, so made. Then I shall claim that this estops them from now asserting to the contrary.

(After argument.)

The COURT: I sustain the objection.

Mr. TOWLE: I will take an exception.

E. ALEXANDER, called for the respondent, sworn.

Mr. TOWLE:

Q. Captain, were you master of the steamer "Queen of the Pacific" at the time when this misfortune of her sinking or stranding at Port Harford occurred?

A. Yes, sir.

Q. How long had you been master of her at that time?

A. Since 1882.

Q. Continuously?

A. Yes, sir—no, I was off maybe three or four months sick; five months or six months.

Q. What was the condition of that vessel as to repair—equipment, when she started from San Francisco upon that voyage?

A. Good; first class, as far as I know, or did know.

Q. What officers did she carry?

A. She carried four mates, I think; four engineers, two stewards, and the master.

Q. How many of the crew, sailors?

A. I think at that time—I would not say positively—we had about twenty sailors.

143 Q. Is that a sufficient number for a vessel of her class?

A. I should say so, yes, sir.

Q. How many firemen did she carry?

A. I think nine firemen.

Q. Was that number sufficient for a vessel of her class?

A. Yes, sir.

Q. Was she a passenger vessel?

A. Yes, sir.

Q. Did she have passengers on board at that time?

A. Yes, sir.

Q. About how many?

A. I think some one hundred and fifty or one hundred and sixty. I would not say positively. Maybe more than that maybe less.

Q. Was she supplied with competent service in the steward's department?

A. Yes, sir.

Q. Sufficient for the needs of the passengers?

A. Yes, sir.

Q. Was she properly provisioned?

A. Yes, sir.

Q. And had she a proper coal supply?

A. Yes, sir.

Q. Do you remember how, shortly before this time she had undergone inspection by the local inspectors?

A. I do not, but my impression is it was something like—it might have been about that time. Her first inspection was the 6th day of May, 1882—no, the 4th day of June, 1882. That was her first inspection.

Q. Do you know when she was built?

A. In 1882.

Q. What character of vessel was she?

144 A. She was an iron steamer; a screw steamer; brig rigged.

Q. Who were her builders?

A. Cramp & Sons.

Q. Do you know whether or not she was submitted to regular inspections from the time she was built until the date of this occurrence?

A. Yes, sir, I know she was.

Q. How often did those occur?

A. Once a year.

Q. Do you know what the character of her rating was by the board at her last examination before this?

A. A, 1.

Q. By "before this" I mean before this accident?

A. Yes, sir, she had a first-class rate.

Q. From the time of that rating until the time of this occurrence, do you know of anything which would tend to render unseaworthy the "Queen of the Pacific"?

A. I do not.

Q. How long have you been connected with the Pacific Coast Steamship Company?

A. Since February—it was Goodall, Nelson & Perkins when I first went there—February, 1874.

Q. Who has charge of the repairs at San Francisco upon the vessels operated by the Pacific Coast Steamship Company, or, rather, who did have at that time?

A. The repairs upon the ships?

Q. Yes.

A. What do I understand? Do you mean the carpenter?

Q. No. Who controls and directs the repairs?

A. Captain Goodall.

145 Mr. ANDROS:

Q. Captain Charles Goodall?

A. No, sir—yes, Captain Charles Goodall, Junior.

Mr. TOWLE:

Q. C. M. Goodall?

A. No, sir, it was senior at that time.

Q. At that time Captain Charles Goodall?

A. Yes, Captain Charles Goodall.

Q. What is the custom, so far as an examination of vessels for the purpose of repair—what was it at that time?

Mr. ANDROS: We are not going into the custom of other vessels. We want to know what was done with this one.

Mr. TOWLE: In connection with this vessel.

Q. What was the custom in connection with repairs to be made upon that vessel at or near the time?

A. After the accident, or before?

Q. Before.

A. Anything that wanted to be repaired was reported by the master of the ship to the superintending engineer or carpenter, whichever it might be.

The COURT:

Q. And then repaired?

A. And then repaired. Anything that wanted to be repaired was reported to the superintending engineer or the company's carpenter. If he wanted a new mast made, that was reported to the

carpenter, if it was a wooden one. If it was an iron one it was reported to the engineer.

Mr. TOWLE:

Q. When the master or superintending engineer requested, or said repairs were necessary, within your knowledge, what was the custom as to supplying those repairs, upon the "Queen of the Pacific"?

146 A. Of course, that was referred to the president of the company, Captain Goodall, and he would investigate and see for himself as to any repairs to be made, outside of the regular routine. If a stanchion broke off, that was fixed up by the carpenter. If any expensive work was to be incurred, it would have to go before Captain Goodall, the president of the company.

Q. What, as a rule, was done? Were those repairs that were suggested made or not?

A. Yes, sir, they were made.

Q. Are you able to state whether or not that had been the uniform course of procedure from the time the steamer "Queen" was built?

A. Yes, sir, ever since I have been in their employ.

Q. Do you know of anything connected with the steamer "Queen" from the date of her sailing from San Francisco to the time of her sinking that would tend to render that vessel unseaworthy?

A. I do not.

Q. Has she been in commission since that occurrence?

A. Yes, sir.

Q. Is she still in commission?

A. Yes, sir, I think she is. She has been this winter, I know. She may be laid up now. She may be in commission now.

The COURT:

Q. Has she been on the Alaska route this winter?

A. On the Portland route, in the place of the Columbia.

Mr. TOWLE:

Q. How long have you been familiar with iron steam vessels, Captain?

147 A. I might say since 1882, although I was in the "Constantine." She was an iron ship. I was in her in 1876, I think, for about six or eight months. Ever since 1882 I have been in iron ships all the time. I have been in a wooden ship, the "Mexico." I was in the "Constantine" in 1876. She was an iron ship.

Q. From your knowledge of iron steam vessels, what rating would you give the steamer "Queen" as she was at the time that she sailed from San Francisco just prior to this accident?

A. First class; the best that is given for iron steamships.

Q. Was water discovered in the "Queen" prior to her arrival at Port Harford at that time?

A. Yes, sir.

Q. Do you remember about the time that your attention was called to it?
A. I think it was somewhere about 2.30 in the morning, a. m.

The COURT:

Q. The morning after the vessel left San Francisco?
A. It might have been 3 o'clock. Somewhere from 2.30 to 3 a. m. after leaving here, the next morning.

Mr. TOWLE:

Q. Did you then endeavor to ascertain how the water entered the vessel?
A. Yes, sir.
Q. Were you able then to find where it entered the vessel?
A. No, sir. I knew very near where it came in the vessel, but I did not know how it came in. I knew it came in on the starboard side in a water-tight compartment.

148 Q. At half past two what was the situation of the vessel; what was her condition, so far as you knew it? Was she upright, or did she have a list?
A. At half past two, when I was called, the chief officer told me she had probably six or seven degrees list to starboard. She might not have had more than five; somewheres from five to eight degrees starboard list.
Q. Did that decrease or diminish?
A. It increased.
Q. As the result of the increase of list, what if anything, did you do for the safety of the vessel?
A. I gave the chief officer orders to trim freight from starboard to port, and there was water found in the after between-decks, also the hatch taken off to let the water go in the ship's after lower hold.
Q. Did that check the list?
A. No, sir.
Q. Where did the progress of the vessel at that time come to an end?
A. How is that?
Q. Where did the progress of the vessel at that time come to an end? Where did she stop going ahead?
A. At Port Harford, when she got through——

The COURT:

Q. When did she stop?
A. She stopped at Port Harford.

Mr. TOWLE:

Q. Whereabouts at Port Harford?
A. About, I should say, 250 or 300 yards from the end of the wharf at Port Harford.
Q. How came she to stop in that position?
A. She run on the bottom.

149 Q. How did she come to run on the bottom? The result of accident or design?

A. Design.

Q. On whose part?

A. My part, as master.

Q. After she run on the bottom, what if anything, occurred?

A. She filled, of course.

Q. In your judgment, was the putting of her on the beach a prudent act on your part at that time?

Mr. ANDROS: I object to the question. There is no evidence she went up on any beach. He says she stopped about 250 or 300 yards from the wharf.

The COURT: He says she purposely went on the bottom.

The WITNESS: I never have seen the bottom. I don't know whether it was beach or sand or rocks. I know I run her on the bottom, and she fetched up in 23 feet of water.

Mr. TOWLE:

Q. Was it your intention that the should take the bottom at that point?

A. Yes, sir.

Q. Did you regard that at that time a prudent measure for the safety of the vessel and cargo?

A. Most decidedly so, yes, sir.

Cross-examination.

Mr. ANDROS:

Q. Captain Alexander, when your attention was first called to the fact that this vessel had sprung a leak, did you go below to examine it?

A. Yes, sir.

Q. How much water had she then between-decks, if any?

150 A. When I got down I suppose there was in the starboard wing a foot and a half of water; two feet, maybe.

Q. Did you ascertain about where the water was coming in through the side of the ship?

A. No, sir, I could not ascertain.

Q. Did you ascertain about the locality, where the leak was?

A. Yes, sir, very near. I located it within 100 feet, I suppose.

Q. Could you tell about how high above the between-decks the leak was?

A. I could not tell. It was in a water-tight compartment, so I had no way of seeing or finding out.

Q. Was it coming in fast or slowly?

A. I could not say that. I did not see how fast it came in. It increased in the between-decks all the time.

Q. How rapidly did it increase in the between-decks?

A. That I could not say. I was only down there once. Then I went on the bridge and staid there until we got to Port Harford.

Q. Was any report made to you whether it was increasing rapidly or not?

A. Yes, sir.

Q. By the officer in charge?

A. Yes, sir.

Q. How long after you first went down there, which I understand you to say was about the time that the leak was reported, was any report made about the extent of leak or the increase of it?

A. I suppose fifteen or twenty minutes. I should say that. A messenger reported it to me from the chief officer.

151 Q. What efforts were made to free her of water, if any?

A. The hatch was taken off the after between-decks, and the engineer had orders to tap the bulkhead in the alleyway, and also the shaft alley, to let the water come down in the engine-room.

Q. Was the water at any time baled or pumped from the between-decks into her lower hold?

A. Yes, sir, baled into the lower hold from the after between-decks.

Q. In large or small quantities?

A. I could not say. I was not down. They did the best they could. We had all hands there.

Q. I am asking about the quantity, if you know.

A. I don't know. I was on the bridge.

Q. What had been the weather after you sailed; the usual spring weather?

A. You mean from San Francisco?

Q. Yes.

A. Strong northwest winds; heavy northwest winds. You might consider it a moderate gale. I don't know how you would figure it. A heavy northwester.

Q. Going back a little: What personal examination did you make of the condition of the hull of the "Queen of the Pacific" previously to her sailing upon this disastrous trip?

A. How is that?

Q. What personal examination did you make of the

152 "Queen of the Pacific" previous to leaving upon this trip?

A. None.

Q. How long before she sailed upon this trip had you made any personal examination of your own?

A. It might have been the trip before, or two trips, that I was in the between-decks, or three or four trips.

Q. Did you go all over the ship to see what the condition was?

A. No, I went down in her between-decks or hold.

Q. That is, you went in there casually?

A. I went in there casually.

Q. This steamer had been laying up at Sausalito?

A. I don't know.

Q. Before she went on this trip?

A. Never to my knowledge.

Q. Was she laid up afterwards?

A. I don't know about that. I left in 1889. I don't know what became of her then. I know she was running. I was not in command, so I could not say.

The COURT:

Q. Had she been making regular trips before this?

A. Yes, sir, she was never laid up to my knowledge from 1882 to the time of the accident. I commanded her except about five or six months, when I was sick.

Q. The trip previous to this?

A. Yes, sir. I had been in her from 1882 to the accident. In 1884 I was sick, and Captain Ingalls, I think, took charge of her for five months.

153 Q. This water-tight compartment—was it lengthwise of the ship—athwartship?

A. No, sir; fore and aft; opposite the boiler and engine.

Mr. ANDROS:

Q. About what time was it that you arrived at Port Harford?

A. I think about seven o'clock a. m. I could not say within ten or fifteen minutes, or half an hour.

Q. What was the condition of the vessel then in respect to her starboard list?

A. She had a big starboard list at an angle of 30 degrees.

Q. Enough to take the water on deck over her shear plank?

A. No, sir; not when we arrived at Port Harford.

Q. How much water was she drawing when she left here?

A. I think 18½ feet or 19. I could not say positively.

Q. Do you know how much water she was drawing at the time you got within 200 or 300 yards of the wharf?

A. I do not.

Q. Can you form any estimate from what you saw?

A. We fetched up on the bottom in about 23 feet of water; that is the only thing I can go by.

Q. After you started to go to Port Harford and got to Port Harford, what point were you aiming for?

A. Port Harford.

Q. What point in Port Harford were you headed for—the wharf?

154 A. When I went in there?

Q. Yes, when you were under way.

A. The ship was heading about west-southwest, and the wharf lays northwest by north and southeast by south.

Q. When you went into Port Harford usually, what was your course?

A. Northwest by north, by her compass.

Q. How was she haading—I think you stated, but I will let you repeat it—at the time she took the bottom?

A. About west-southwest, or west by south.

The COURT: She turned in there and turned out?

A. She was at right angles from where the wharf lay, almost.

Mr. ANDROS:

Q. Before she headed in the way you say she did, west by south, how was she heading immediately before that?

A. Immediately before that?

Q. Yes.

A. She was heading, when we went around the reef to go to Port Harford, about northeast.

Q. How long before she was heading west by south had she been heading in some other direction?

A. Well, that I could not say. Maybe a couple of minutes; maybe a minute.

Q. What direction was she heading in that couple of minutes or minute before she was heading west by south?

A. I suppose about northwest, northwest by north.

155 Q. Where would that last course you have mentioned have taken her in respect to the wharf, if she continued on that course?

A. It would have taken her to the wharf. Northwest by north would have taken her to the wharf.

Q. How long after she was headed west by south was it before she took the bottom?

A. Maybe a half a minute. It might have been a minute. I could not say exactly.

Q. At the time when you changed your course from west by north to west by south, in what depth of water had she been? Was the water pretty even there?

A. The nearer you get to the shore the shallower it is. The chart will show that very plain. When we came around the reef we came around in 30 or 35 feet of water. As we go to the wharf it shallows up.

Q. In what depth of water do you think the vessel was half a minute or a minute before you changed your course?

A. I could not say. Maybe 26 or 27 feet, or 28 feet. I never sounded it.

Q. Did you know at the time you changed your course what the depth of water was at the place she took the bottom?

A. Very near, within a foot.

Q. Are you able to say within a foot what the depth of water was at the time you changed your course to west by south?

A. We will say within a foot.

156 Q. What, then, would you consider the depth of water under the ship's bottom to be the minute you changed her course, the course she was then, to west by south?

A. It might have been a foot more. I would not say. You can easily get the chart and look at it.

Q. If you grounded in 23 feet of water, it might have been 24 feet when you changed the course?

A. Yes, sir; it might have been 25.

Q. If you grounded in 24 feet of water it might have — 25 feet?

A. Yes, sir; I think there is 22 feet of water at the wharf, and that is all I know.

The COURT:

Q. You did not try to reach the wharf?

A. No, sir; I gave the chief officer the order; I told him to beach the ship, put her on the sand beach.

Mr. ANDROS:

Q. At the time she took the bottom, what speed was she going?

A. I should judge she was going along a knot and a half.

Q. What is the depth of the water alongside of the wharf, where you make the landing?

A. 22½ feet.

Q. At that stage of the tide?

A. I could not say. I don't remember whether it was high or low water.

Q. Take it at average low water.

A. I think 22½ feet.

Q. At high water it would be what at that season of the year?

157 A. I think 22 feet at the end of the wharf; mean low water.

Q. At high water.

A. The average rise and fall is about 4½ feet.

Q. Do you know the state of the tide at this time?

A. No, sir, I don't remember.

Q. You do not remember whether it was flood or ebb?

A. No, sir; it was the 30th day of April, 1888. It is easy to find out the time of the tide.

The COURT: About 7 a. m.?

A. Yes, sir. It might be about half past six or a quarter to seven, or a quarter past. I don't remember exactly now, it is so long ago. It was somewhere near 7 o'clock.

Mr. ANDROS:

Q. When she took the bottom how was the water in respect to her between-decks?

A. I was not down between decks after she took bottom. I was on the main deck.

Q. How much was she out of the water?

A. I suppose her main deck was out a foot; maybe more. It may be a foot and a half. I could not say. It might have been two.

Q. How long after you changed her course was it that she filled? How long after she took the bottom was it before she filled? Immediately?

A. After she took the bottom?

Q. Yes.

A. I should say it was twenty minutes. It might have been more than that. I could not say. I know we took the pas-

158 sengers off in the boats. Twenty or twenty-five minutes; maybe twenty minutes. It may not have been that long;

somewheres that long. I know as soon as she fetched up we lowered the boats and put the passengers ashore. We did not have to lower them away very fast, though.

The COURT:

Q. Was there a sea running there then?
A. No, sir. There was a surf landing, but no swell to amount to anything; nothing at all.

Mr. ANDROS:

Q. Did you at the time you changed your course know about the depth of water where she sunk, and before she sunk?
A. Somewhere near within a foot or two.
Q. When you changed your course to west by south, she would then be heading parallel, or nearly so, would she not, with the end of the wharf?
A. The wharf lay northwest by north, and we were heading west by south. We would come in six points of heading parallel with the wharf. If she had been two points more to the left she would have been at right angles to the wharf.

The COURT: Mr. Andros, would you have any objection to Captain Alexander's marking this out on the chart?
Mr. ANDROS: I don't know that we would have.

The COURT:

Q. There is the chart, Captain. Point it out.
A. There is about where she lay (indicating).
Q. Where she took the ground?
A. Yes, sir.
159 The COURT: The captain has marked the position of the vessel when she took ground.
A. It might have been a little further out than that.

Mr. ANDROS:

Q. How far is the sand beach where the whalers had their station from where she took bottom?
A. I suppose six or seven hundred yards; five hundred maybe.
Q. When you come in ordinarily, is that the course that you take to get to the wharf?
A. Yes, if I am coming down here, if I am off here I come this way (indicating). We might have been a good deal further off than that. This is the first thing we made (pointing). It was thick that morning.
Q. When you make Port Harford coming in, and at the same distance you were from the shore on this occasion, that would be the course you take?
A. We go outside of that buoy.
Q. That is, ordinarily?
A. Yes, sir, ordinarily. We never went inside since the Santa Rosa went on there. That has been our orders.

Q. How happened you to go inside upon this occasion?

A. We did not. I say that is wrong; that is the line there, the outside line that we came in. Here is where we came in. Here is where we fetched up (pointing).

Q. That is the course that you take in going to the wharf?

A. That is the course that we take going to the wharf.

Q. You go in port side to the wharf?

160 A. We always land port side to the wharf. The down ship has the east side, and the up ship has the west side.

Q. Why did you change your course from the course that you were running just previous to west by south? Why did you change to west by south if you were running to make the wharf?

A. I was not running to make the wharf.

Q. How long before you changed your course to west by south was it that you were running to the wharf?

A. After we came around the rock here somewhere. I could not say exactly. It is but a little ways from there to there (indicating). It was after I came around inside.

Q. Was the ship's course changed by an order from you to the quartermaster?

A. Yes, sir.

Q. What occasioned you to change the course of the ship at that particular time to west by south?

A. It was, not to put her alongside the dock in the condition she was in—a sinking ship.

Q. What would have been the disaster, if any?

A. There were rocks all around the wharf. There have been rocks discovered there. I know there are lots of them from the east side. There is a sand beach here, and over there (pointing).

Q. If you put her alongside of the wharf and she filled and tipped over, she might have taken rocks?

A. She was liable to.

Q. You thought it was better to change her course and not put her alongside of the dock?

A. I thought it was better to put her upon the beach

161 somewhere. Here is the best beach, over there, Point Haviland, but you are exposed to the sea. Here you are not exposed as much as you are over here (pointing). There is the best beach here.

The COURT: There is something of a breakwater there now.

A. That is out 300 feet.

Mr. ANDROS:

Q. Was that there at the time?

A. No, sir.

The COURT:

Q. It was not built at that time?

A. No breakwater at that time. It is built from Whaler's island into the mainland now, and also 300 feet outside of Whaler's island. It may be 350 or 400 feet.

(A recess was here taken until 2 o'clock p. m.)

Afternoon Session.

E. ALEXANDER.

Cross-examination resumed.

Mr. ANDROS:

Q. How far from your usual berth at the wharf at Port Harford is the bottom rocky, if you know? Did you ever examine personally?

A. From the wharf?

Q. Yes.

A. I could not say. I know there is a rock on the west side of the dock that they know of.

Q. Is the west side of the dock your usual dock?

A. No, we go on the east side. They use both sides. On the east side there are rocks.

Q. Sunken rocks?

A. It is a rocky bottom.

Q. What I want to know is, how far from the line of the wharf itself does this rocky bottom commence?

A. Outside.

Q. How far from the wharf?

162 A. I don't know of any rocks outside of the wharf. I know where the "Queen" grounded; she grounded on rocks. It is a well-known fact.

Q. When she did ground, she grounded on rocks?

A. Yes, that is off the end of the wharf.

Q. Take her usual berth on the west side, and on the east side. How far from the line of the wharf is there a rocky bottom on the west side?

A. I think right up the wharf, both east and west.

Q. How far?

A. My impression is all along the wharf. I could not say that positively, because I don't know. My impression is you will find rocky bottom all the way out pretty near to the end. I know there is one rock on the west side.

Q. How far is that from the line of the wharf?

A. I should say 60 or 70 feet.

Q. You spoke of this leak in the vessel that was in the between-decks.

A. Yes, sir; that is, as near as we could ascertain.

Q. How far was it from the after bulkhead?

A. That I could not say. You mean at the time?

Q. Yes.

A. I have no idea, at the time it occurred.

Q. Was the cargo stowed full in the after between-decks?

A. Yes, sir.

Q. How near to the after bulkhead was it stowed in the alleyway?

A. In the after bulkhead?

Q. Yes.

A. Right up to the bulkhead, to the door that opens into the alleyway.

163 Q. Leaving space enough for the door to swing in?

A. The door opens aft into the after between-decks, and shutting towards the alleyway, forward.

Q. There is a door in the forward bulkhead, too?

A. Yes, sir.

Q. Do you know in the stowing of the cargo in those alleyways, whether they commence about the center and stow aft and forwards?

A. I do not.

The COURT:

Q. What is the width of the bulkhead alleyway, inside?

A. I don't know exactly, but I should say ten feet. It may be more than that; it may be eleven. It might be nine or twelve. I should say about ten feet—the width of the alleyway across between-decks.

Mr. ANDROS:

Q. Was the reason why you could not discover where this leak was on account of the between-decks being filled with cargo?

A. No, sir.

Q. Why could you not find it if the cargo did not obscure it?

A. We tried to discover it from the outside, and could not. There were men on the outside to see if they could discover anything upon the outside of the ship, and could not.

Q. Why did you not try to discover it from the inside, if the cargo could not prevent you?

A. My instructions have been and were——

Q. Never mind your instructions. Why did you not do it?

A. Because the United States inspectors told me to close

164 those doors and keep them closed, and never open them. The United States inspectors of hulls and boilers.

The COURT:

Q. At sea?

A. At sea, in case of an accident.

Mr. ANDROS:

Q. No matter what danger the ship was in?

A. No matter what danger the ship was in.

Q. Did you understand by that instruction that you were not to take any proper precaution to ascertain whether there was a leak or not, and stop it?

A. How did I know there might not have been a place off the side of the ship, or we had collided with something? To use good judgment I considered it proper to keep those doors closed, in all

compartments, when we find the ship making water, and I should do the same thing tomorrow.

Q. To keep the water from running out or running in?

A. To keep the water from running out or running in.

Q. Was there any water upon the deck forward of the bulkhead?

A. No, sir.

Q. There was no water then to run in?

A. You mean forward?

Q. Yes.

A. No, sir. When I say there was not, I don't know. I was not there. I did not go forward.

Q. All the water you know anything about was in between-decks?

A. In the between-decks.

Q. In the between-decks where the cargo was stored, and in the after part of the between-decks?

A. Yes, sir.

Q. When you were on your course with the wind northwest, how did you have your wind, on the quarter?

165 A. Going out here we steered southeast half east. We called it a northwest wind.

Q. I am speaking of after you got across the bar.

A. The wind would be about west after crossing the bar.

Q. That would be about how abaft the beam?

A. A little abaft the beam.

Q. It would be what you would call a free wind?

A. Two points abaft the beam.

Q. That would be a free wind?

A. Yes, sir; a leading wind.

Q. In going down the coast upon your various trips, you encountered wind and sea as heavy as there were upon this occasion?

A. Yes, sir.

Q. It was about what they call the ordinary weather for that season of the year?

A. No—ordinary weather. Yes, it was just the same, like our north winds in the spring of the year; like I had last trip. I had one trip the same kind of a wind and sea going down.

Q. The winds vary according to the season in strength and velocity?

A. The north winds do; yes.

Q. How long did you remain at San Luis Obispo before your ship was in condition to return? About how long?

A. I think three days. My impression is we left there on the morning of the fourth day.

Q. It was Monday morning that you arrived there?

166 A. Yes, sir; I think it was Monday morning.

Q. And left on Thursday?

A. I think we left there Friday morning and arrived here Saturday. I would not say, now. Of course, the record will show what time we arrived and left. My impression is we left here Friday and arrived here Saturday. I know the ship was raised

upon the third day. We laid there, trimmed the coal, and left the next morning. The men were all used up from working so long.

Q. You would have gone into Port Harford anyway, if no accident had happened?

A. Yes, sir; that was our first port to make from San Francisco.

Redirect examination.

Mr. TOWLE:

Q. Did the "Queen of the Pacific" at that time have a guard, or a stringer, a fender?

A. Yes, sir.

Q. Can you describe that?

A. It is a piece of oak 14 inches thick upon the ship's side, supposed to go on somewhere, either the upper deck or lower deck, wherever they pleased. They do not put it on between wind and water, as the sailors say. This guard was put on between the between-deck frames, about 14 inches thick—the guard and batting; maybe 16 inches. I don't remember now how wide it was. Probably 10 inches down and about 14 inches out from the ship's side, guard and batting.

Q. Did that go the whole length of the ship?

A. No, sir.

Q. Now, nearly the whole length?

167 A. I think it went within twenty or thirty feet of the bow. Say, 20 feet, and I suppose the same aft. I don't remember exactly now. Twenty or thirty.

Q. With reference to that guard, how did the seas run alongside the "Queen" upon that voyage?

A. How did the sea run?

Q. Yes, with reference to the guard. Did the sea run above it or below it, or how?

A. It was running above it. Of course the sea comes along. It was not all the time above it. Off and on. The sea would wash over the guard, away above the guard.

Q. In your best judgment how frequently on the trip would the sea be above the guard along near the amidships of the vessel?

A. I suppose four or five times a minute. Make it four times.

The COURT:

Q. When the vessel was on an even keel in still water, how would the guard be?

A. It would be above water.

Q. How much?

A. I am under the impression it was a foot and a half above water. That is, the way she was loaded at that time. If she was light, it would be above that. I am under the impression that guard was a foot or a foot and a half above water. I may be mistaken, but I would say that.

Mr. TOWLE:

Q. Whatever the height of the guard may have been above the water, is it your estimate that the waves ran above the guard as often as you have stated?

A. Yes, sir.

168 Q. About what is the ordinary length . . trip from San Francisco to San Diego?

A. I think we were making the trip then in about two days and a half, at that time. I think we make it about the same now. We made it less than that. We left at two o'clock then, and now we leave at eleven. I think we made it in about two days and six hours or five hours.

Q. That was the average length of the trip at that time?

A. Yes, sir.

Q. Do you remember how long after you returned to San Francisco it was before your cargo was discharged?

A. I do not. I am under the impression that I took command of another ship and went out on her in place of the "Queen." I think I did, if I remember rightly.

Q. Was the freight in the after between-decks stowed in such a way as to prevent your seeing the side of the vessel in that portion of the ship?

A. From the inside, do you mean?

Q. From the inside, in the after between-decks.

A. Well the way it was stowed here, it would have to be moved to see the side of the ship.

The COURT:

Q. Do you mean outside?

A. He said "inside." You mean in the alleyway?

Mr. TOWLE:

Q. On the inside.

A. The freight was stowed up to the side of the ship.

The COURT:

Q. In the water-tight compartment?

Mr. TOWLE:

Q. I am not speaking about that. I am speaking about the after between-decks.

A. Yes, you could go down there.

169 Q. Did you ascertain where the water came from into the after between-decks, whether it came into the side of the vessel directly from that point, or whether it came in out there, from this alleyway, as you term it?

A. It came from the alleyway.

Q. As I understand you, you did not consider it prudent at that time to open either of the doors that closed the alleyway?

A. I did not, sir.

Q. You have spoken of the speed of this vessel a- the time that she took the bottom at Port Harford, as about a knot and a half?

A. Yes, sir.

Q. Do you know of any defect in her machinery at that time, or prior to that time, that caused that reduction in speed?

A. I think the machinery was all right, but with a ship lying over on her beam ends it would not go, anyhow. She is not built for them. The trouble was with the boilers keeping steam.

Q. Because of the list of the ship?

A. Yes, sir. I am under the impression that the safety plugs were blown out of some three or four boilers because of the list of the ship. I think they could not get into the starboard bunkers from the engine-room. I was not down there. I know there was water down there.

Q. You knew of no break in the machinery?

A. None to my knowledge. I think the machinery was all right. I am quite sure it was.

Q. She continued her headway until she took the bottom and brought up?

A. Yes, sir.

170 Q. About what was the average speed of the "Queen"?

A. About fourteen and a half knots an hour, or fifteen. I have run her sixteen and a half, nearly. Her average speed is about fourteen and a half.

Q. Did she carry watchmen?

A. Yes, sir.

Q. What watchmen did she carry?

A. She carried a saloon watchman and a deck watchman; two watchmen.

Q. Were they on duty at nights?

A. Yes, sir.

Q. Did she have quartermasters?

A. Yes, sir; four.

Q. You have testified to the officers which you carried. Were they competent to discharge their duties?

A. Yes, sir.

Q. Was your crew a competent crew?

A. They were.

Q. Does that statement apply to all departments of the ship?

A. Yes, sir.

Q. Had she a sufficient supply of fuel?

A. Yes, sir.

Q. Do you know of anything which she lacked in the way of outfit or equipment?

A. I do not.

Q. Fuel or stores, or anything which she lacked in those respects?

A. I do not.

Recross-examination.

Mr. ANDROS:

Q. You have spoken of a guard. I want to find out something about that. How many feet below the covering board was that guard placed?

171 A. I suppose about eight feet below the covering board.

Q. It was in two parts, I understand, one forward running aft and one aft running forward?

A. No, sir.

Q. Where did it begin?

A. It was on the ship's side running fore and aft; no opening in at all.

Q. The whole length?

A. No, sir, it extended within twenty feet of the bow and twenty feet of the stern.

Q. Constructed so as to take in the straight side of the ship?

A. Yes, sir.

Q. That was sort of a fender?

A. Yes, sir.

Q. It was put on for that purpose?

A. Yes, it served for landings.

Q. You have seen a sea break over the top of that on other occasions?

A. Yes, oftentimes.

Q. Nothing extraordinary about that, was there?

A. Not as far as the sea breaking over, no. I have seen it lots of times break over the guard.

Q. When you go out from here, how far off do you go before you lay your course to the southward; past the whistling buoy?

A. Seldom that far; generally go through the south channel.

Q. And lay your course down?

A. Down from Point Pedro.

Q. How far off shore do you keep in ordinary weather?

A. About a mile and a half.

172 Q. After you lay your course down, having got outside of the Heads as far as Point Pedro, what is the usual course that you steer?

A. To pass Pigeon point two miles and a half off, three miles, maybe, or somewhere along there; to Point Sur two or three miles off; Pedros Blancos two or three or four or five or seven miles. We do not always pass those points the same distance off.

Q. My question was, what course you steer after you lay your course down until you get to Point Pedro, about; the usual course?

A. If you will give me a parallel rule or chart, I will give you it exactly.

Q. I do not care about it with accuracy. I want it in a general sort of way.

A. It is southeasterly. I don't remember how much deviation the "Queen" had on a southeast course to a south course. Some ships have a point and some have two points. The course is south-

easterly. I think to Point Pedro the course is about south by east, magnetic, and we haul in as we go down the coast.

Q. How far is Point Pedro from the Heads, about?

A. I think about fourteen miles.

Q. What is the next point that you mentioned?

A. Pigeon point.

Q. That is about how far?

A. About twenty-eight miles.

Q. Point Sur the next?

A. Yes, sir, Point Sur, the next—about sixty miles—fifty-eight.

173 Q. You left on that occasion what time in the day?

A. I think it was two o'clock; two o'clock p. m.

Q. You would get down, then, to Point Pedro, in about an hour or a little over an hour?

A. Yes, sir.

Q. And you would get to Pigeon point in about how long a time after leaving San Francisco?

A. About two hours and a quarter.

Q. You would arrive off Point Sur about what time?

A. That is about fifty-eight miles. We would run along about fourteen knots and a half or fifteen. That would be four hours. If it was sixty miles, fifteen knots would give it four hours.

Q. After passing Point Sur you would haul up more to the eastward?

A. Yes, sir.

Q. Is there any way of getting down into the between-decks where the cargo is stowed, except though these bulkhead doors?

A. Getting into the alleyways?

Q. Yes.

A. No, sir; none to my knowledge.

Q. There is no means of going down from the scuttle into the cabin?

A. Not from the alleyways.

Q. Can you get into the between-decks where the cargo is stowed in any other way than through the bulkhead doors?

A. Yes, sir.

Q. How is that?

A. The hatch.

Q. Where does that hatch open?

A. In the saloon deck; the dining-room deck; the main deck.

174 Q. That would not admit you in that portion of the between-decks that is shut into these bulkheads?

A. You could not go into the alleyways without opening the door, but you can go in the after between-decks through this hatch. To get into the alleyway you would have to open the door.

The COURT:

Q. There are two doors to each alleyway?

A. Yes, sir; on the forward end and the after end.

Q. The same on both sides?
A. Yes, sir; on the port and starboard side.

Mr. ANDROS:

Q. You spoke of making an examination to see if you could discover any leak or any place for a leak, by examining the outside. Did you examine the outside or did the men that were directed to do so examine the outside by leaning over the rail, or did they go off in a boat?

A. I am under the impression that the chief officer sent a man over the side down in a bowline. I think he did. That is my impression. He can explain that better than I could. I am under the impression he sent a man, but it was so rough he could not go down. It is my impression that he did it. He reported to me that he did.

Q. When you say you did not think it was prudent to open the bulkhead doors for the purpose of seeing what the difficulty was in the after between-decks, is that because you received directions from the inspectors of hulls and boilers to keep them closed when at sea, or because you would not have done it, even if they had not given you such directions?

175 A. I would not certainly go into a water-tight compartment where a ship was making water, without I knew the condition of things. I should not do it today. The guards were put on the ship last trip. I remember Jake Cramp, of Cramp Brothers, told me——

Q. (Int'g.) Never mind what he told you.

A. I did not know but the guards had taken the place off. That was the first trip that the ship had gone to sea with the guards on.

Q. There might have been danger in the guards injuring a plate?

A. I say there might have been. I don't know.

Q. I understand you to say there might have been some danger, and you did not know?

A. I did not know. I did not know the condition of anything.

The COURT: Outside?

A. Outside, and nothing inside in the alleyway either. Elsewhere I did.

Q. This water-tight compartment only extended between-decks?

A. Yes, sir. It did not go down, though.

Q. It extended only up to the main deck?

A. Yes, sir, up to the main deck.

Q. What is the length of the water-tight compartment?

A. I think it is about one hundred feet long.

Q. About ten feet wide?

A. Yes, sir; it may not be ten feet wide.

Q. The water was coming out of that water-tight compartment aft?

A. Yes, sir.

176 Q. There was a slight leak?

A. Yes, sir.

Q. I understood you to say some persons were sent to let the water out?

A. No, sir, that was to let it down from the after between-decks into the lower hold; from the after between-decks into the lower hold, where the pumps could take the water out.

Q. Were your pumps working all right?

A. As far as I know, yes, sir.

Q. Could they take care of the water that did go down into the lower hold?

A. That part, Judge, I don't know. I think they did. I think there is no question about that. The engineer could tell more about that than I could.

Q. The water that came out from the alleyway into the lower decks, as far as you know, was taken care of and pumped out?

A. Yes, sir.

Q. I will ask you another question, to which there may be an objection made by counsel, and you need not answer it until I determine the objection. After the "Queen of the Pacific" was raised at Port Harford, did you discover the cause of the leak?

Mr. TOWLE: We object to that.

The COURT: What is the ground of your objection?

Mr. TOWLE: The objection is that it is not a part of our case and is not the theory on which we are trying it, as to what may have been discovered after the vessel had been on the rocks.

(After argument.)

The COURT: I appreciate the fact that you are trying the
177 case very carefully and on a very narrow margin. I think for the time being I will sustain Mr. Towle's objection to the question put by the court.

Mr. TOWLE: I would like your honor to withdraw the question.

Mr. ANDROS: I would prefer that the objection be sustained.

The COURT: I do not want anything that the court does to change the theory of the case. I will withdraw the question for the present and will see what may come hereafter. I do not know what I may do hereafter.

Further redirect examination.

Mr. TOWLE:

Q. This guard that you have spoken of was continued on the vessel after this time of which you have spoken?

A. Yes, sir, it was as long as I was in her.

Q. It is on her still?

A. I think it is. I could not swear to it. As long as I was in her it was there.

The COURT: I suppose there will be no objection to this question.

Q. There was nothing that you discovered afterward that led you to suppose that the guard had anything to do with the leak?

A. No, sir, not afterwards.

Further recross-examination.

Mr. ANDROS:

Q. Are you aware that any time during her voyage that the ship struck anything until she sunk?

A. I am not.

178 Q. She had no collision?

A. Not to my knowledge. Nothing was reported to me.

Q. If there had been anything serious of that sort, it would have been the business of the officer of the deck, if he did his duty, to report it?

A. Most decidedly so.

Q. If anything unusual happened at any time during the trip, it would have been the duty of the officer of the deck to report that to you?

A. Most decidedly so.

Q. And when the leak was discovered, that was reported to you?

A. Yes, sir.

The COURT:

Q. Off what part of the coast were you at half past two on the morning of the 30th of April?

A. About off Cayucos, about twenty-two miles off Port Harford; twenty-one, or twenty-two, or twenty-three; I cannot tell now exactly when I was called.

Q. Is there any landing at Cayucos?

A. No, sir; the quartermaster suggested to me to put her on the rocks. He said, "Captain, this is a good place to go on." I said, "That is too rocky."

Q. At Cayucos?

A. Below that. He made the remark it was a good place to put her on. I said, No, we will go down further. I told him to take the covers away, have the boats hoisted up, and get ready to abandon the ship.

Q. There was no landing place after you discovered the leak?

A. No, sir. Port Harford was the nearest port to make.

179 Mr. ANDROS:

Q. What time did the ship begin to slow down on account of the difficulty with her boilers or fires?

A. I should say about half past three or four o'clock.

Q. In the morning?

A. Yes, sir.

Q. What time was it when the water got up so that the fires went out?

A. I don't think that the fires went out. They might have on the lee side. I don't know whether they did. The water got out of the boilers, and blew the safety plugs out on account of the list of the ship.

Q. Those safety plugs were blown out on account of what?

A. On account of the list of the ship, and no water in the boilers.

Q. Those were put there for the purpose of preventing explosions when the water gets low in the boilers?
A. Yes, sir, I suppose that is the object of putting them there.

Further redirect examination.

Mr. TOWLE:

Q. You say it is the duty of the officer of the deck to report the fact that the ship had touched bottom, for instance?
A. Yes, sir.
Q. That will be upon the presumption that he knew that it had touched?
A. Yes, sir.

Mr. ANDROS: He could not report what he did not know.

Mr. TOWLE:

Q. It is possible for that thing to be done, without any one knowing that it had been done, is it not?
180 A. There have been a great many cases of that kind, where they have struck without it being reported. Of course I don't know. There is no doubt about that. Those things are occurring quite often.
Q. The same thing would be true if you had collided with a drifting spar, or something of that kind?
A. Yes, sir, an officer might not know it. Take the case of the "Oregon" when she went down off Long Island. They claimed that a schooner ran into her. I heard Captain Frye say he stood on the deck and there was a schooner run into her. A diver from New York told me that the plates were turned out, and if they had collided with a schooner, the plates would be turned in. They were all turned out. The crew all said she was run down by a schooner.

Mr. ANDROS:

Q. If you did discover—I am not asking whether you did or not—the place where this leak was, was it below the water line when the ship was on an even keel?
A. No, sir.

The COURT:

Q. Is there no way of dropping over canvas to cover leaks by reason of her broken plates?
A. Yes, sir.
Q. That British vessel at British Columbia dropped a sail over the bow and pulled it up over the break?
A. Yes, sir.
Q. Could that have been done in this case?
A. Mr. Nash, the chief officer, tried it, and it was a failure. That was tried at sea, before we got in.
Q. It was?

A. Yes, sir, and tried after we got in; the canvas was on. It was both tried at sea and in port.

181 Mr. TOWLE:

Q. What hours were you on deck, from the time you left here until water was reported in the between-decks?

A. I don't know; I was on deck off and on all day. I think I lay down somewhere near ten o'clock. I was up at Piedras Blancas. Somewhere about one o'clock I was on deck.

Q. What was the condition of the deck at that time as to being on an even keel, or otherwise?

A. I did not see anything out of the way. The officer of the deck said, "Captain, the ship has a little list to starboard."

The COURT:

Q. At one o'clock?

A. At one o'clock in the morning. These ships burn coal from port to starboard side, and maybe one hour the ship will have a list to port, and another hour to starboard. The wind will list the ship. That class of ships, like the "Queen," with those high seas, it is almost impossible to keep on an even keel. The same way with the "Santa Rosa." When I was out at one o'clock, there was nothing to indicate anything wrong, not a thing. I was on the ship and all around at one a. m. before I was called at 2.30 a. m. At eight o'clock at night the carpenter went down in the after between-decks and examined the ports, and there was no water at 8 p. m., which is a well-known fact, and reported not a drop of water. Where the water went through the bulkhead; I see they said six to eight inches, it was not. It was not four or three. Above the deck in the alleyway, where the water went through into the engine-room, that was discovered about two or quarter past two
182 in the morning. Where that hole is, any one can see it now, and it is not three inches above the deck.

The COURT: What hole is that?

A. Where the water came into the engine-room, where it was first discovered and reported to the watchman, a hole as large as that pencil, about as big as a ten-penny nail. The water came through there into the engine-room about half past two in the morning. This was through an iron bulkhead, it fell into the engine-room, and that was the first time that water was discovered or any one knew anything about it. It was not three inches above the deck where the water came through.

Q. That was the first water that was seen?

A. That was the first water that was seen or the first thing that any one knew anything about it. It was reported to the watchman and he reported to the chief officer; half past two. The hole is just above the deck in the alleyways.

Q. The water had been running in the alleyway?

A. I could not say. I don't know. No one discovered it. The carpenter examined the ports at eight o'clock at night. No water was in the after between-decks. The first water came through that

hole from the between-decks at about quarter past two in the morning.

Q. Does any one pass over the between-decks during the night?

A. No, sir; the carpenter went down at eight o'clock and examined all the ports.

Q. Then there would be no more examination until later on?

183 A. At eight o'clock the carpenter examined all the ports and reported to the chief officer, and the pumps were sounded every night at eight o'clock. We know that to be a fact. We know that the first water was discovered about quarter past 2 a. m., and that it was coming through the iron bulkhead.

Q. On the starboard side?

A. On the starboard side, and was reported to the watchman by a man from the engine-room. That was about quarter past two or two. I was called about 2.30.

Mr. ANDROS:

Q. When you speak of "ports," do you mean the cargo ports?

A. Yes, sir, the cargo ports in the between-decks, the ports that open outboard, outside of the between-decks of the alleyways.

Q. Outside the water-tight compartments?

A. Outside the water-tight compartments.

Mr. TOWLE:

Q. You were up at one o'clock? How long did you stay up at that time?

A. I don't think I was on deck more than twenty minutes. It may not have been that long; maybe twenty-five minutes; I could not say. I know I was up and around the ship and talked to the officer of the deck. I know that.

Q. Then you lay down again?

A. Yes, I laid down on my lounge in my room.

Q. And stayed there until you were called?

A. I was called by the chief officer.

Q. That was the time that the water was reported in the after between-decks?

184 A. Yes, sir, he reported that to me. That was about half past two; it might have been quarter to three. I don't remember the exact time.

Mr. ANDROS:

Q. There is one thing I am a little in the dark about. When this water was first discovered, you speak of it being in the after between-decks; was it coming at that time under the bulkhead doors of the alleyway?

A. That I could not say. The officer that was down there would be able to tell you.

Q. You do not know?

A. No, sir, I could not say—it was when I went down there. That was about half or three quarters of an hour afterwards.

Mr. TOWLE:

Q. I show you this photograph marked "Claimant's Exhibit 1," and ask you if that is a picture of the "Queen" as she lay at Port Harford?

A. Yes, sir.

Q. Are you able to state about when that was taken with reference to the time that she reached Port Harford?

A. Well, sir, I would say that was taken about the first day after sinking, the first afternoon; maybe the first forenoon; the first day.

Q. You do not remember seeing it taken?

A. I remember seeing the photographer around there. I could not state what moment it was. I know it was the first day.

Q. I now show you a photograph marked "Claimant's Exhibit No. 2," and ask you if you know what that represents. (Handing.)

185 A. That represents the "Queen" as she lay at Port Harford.

The COURT:

Q. In a different position?

A. Yes, sir, at a different angle.

Q. The photographer was in a different position?

A. Yes, sir.

Mr. TOWLE:

Q. The vessel did not shift her position?

A. Not a particle. She did not move a hair from the time she went down there until she was raised.

Q. I show you a photograph marked "Claimaint's Exhibit No. 3," and asked if you recognize that (handing).

A. Yes, sir.

Q. What is it?

A. That is a photograph of the "Queen" as she lay at Port Harford sunk.

Q. On the 30th day of April or the 1st of May, 1888, or thereabouts?

A. Yes, sir. I am under the impression it was taken on the first day. I know there were a lot of photographers there on the first day. I think that is when all these were taken. There might have been some taken the next day. The whole thing shows about the same.

The COURT:

Q. Did her bow ever go under water?

A. No, sir.

Mr. ANDROS:

Q. From the time that this leak was discovered and she took her list to the starboard, she continued to settle gradually until she took her final plunge?

A. Yes, sir, when she fetched up on the bottom of Port Harford.

186 THOMAS R. CRAGIE, called for the respondent, sworn.

Mr. TOWLE:

Q. You are the secretary of the board of local inspectors?
A. Yes, sir.
Q. Have you the record of inspection granted by the board for the year 1887?
A. We have a copy of the record. The original is in the office of the collector of customs. This is the copy.
Q. This is the official record of your office, is it?
A. Yes, sir, the original sworn certificate is in the records of the collector of customs. This is made right at the time that the original certificate is issued.
Q. This is the same as that sworn statement?
A. Yes, sir.

Mr. TOWLE: Is there any objection to this?
Mr. ANDROS: No. I do not propose to take up time by objection to that.

Mr. TOWLE:

Q. In whose handwriting is that?
A. Mine.
Q. How did you get the date from which you filled out that certificate?
A. From two small books. One made up by the inspector of hulls and the other by the inspector of boilers. They make them up on board of the ship.
Q. That, then, so far as related to the description, is taken from their books of survey, so to speak?
A. Yes, sir. This is not as full as those books. There are more minute items in the small books.
Q. That is what the law requires to be put into the certificate?
A. Yes, sir.

187 Mr. ANDROS: I have no objection to that going in as though that were the original certificate.

Mr. TOWLE:

Q. You have with you the certificate of inspection for the steamer "Queen of the Pacific" for the year 1887?
A. Yes, sir.

Mr. TOWLE (addressing Mr. Andros): Do you want that read in evidence?

Mr. ANDROS: No, I do not care anything about it. You can have a copy made and hand it to the reporter. The court will have to read it when he comes to read the testimony.

Mr. TOWLE:

Q. What does that certificate show?
A. It shows when and where built and when she was inspected.
Q. What is the effect, if you know, of granting that certificate?

Mr. ANDROS: I object to that. That is a matter of opinion.
The COURT: I sustain the objection.
Mr. TOWLE: To identify this, we offer in evidence what appears on page 112 of the book, which is endorsed on the back as follows: "2113. Copies of certificates of inspection. Passenger steamers. U.S. local inspectors. Steam vessels. Port of (blank). The heading being "by authority of the United States of America. Certificate of inspection for passenger steamers. Passenger steamer 'Queen of the Pacific.' This certificate expires on June 21, 1888." It contains this clause: "The said vessel is permitted to navigate for one year the waters of the Pacific ocean coastwise between San
188 Francisco, Alaska, and touching at intermediate points, a distance of about 3,000 miles and return, and Panama."

A. There was not room for all to go in, and Panama was added afterwards.
Q. Coastwise from Alaska to Panama?
A. Yes, sir.

Mr. TOWLE: We offer that page, and we will supply the copy of the certificate later.
Mr. ANDROS: No questions.

JAMES DICKIE, called for the respondent, sworn.

Mr. TOWLE:

Q. What is your profession or occupation?
A. Ship-builder.
Q. How long have you been a ship-builder?
A. For over thirty years.
Q. And in constructing what character of ships, what kind of ships?
A. Both wood, iron, and steel vessels.
Q. How long have you been engaged in constructing iron vessels?
A. About twelve years; at the Union iron works.
Q. In what capacity are you connected with the Union iron works?
A. Superintendent of the ship yard.
Q. What business is done by the Union iron works?
A. Building all classes of vessels.
Q. Will you enumerate some of the classes?
A. We have built several freight boats, several passenger boats and some war ships.
189 Q. Have you been the general superintendent of the construction of all those war vessels?
A. Yes, sir, every vessel that the Union iron works has built.
Q. Do you know the steamer "Queen of the Pacific"?
A. Yes, sir.
Q. When did you first come to know that vessel?
A. Ever since she came out here.

Q. Ever since she came to this coast?
A. Yes, sir.
Q. Do you remember what year that was?
A. I do not remember what year that was.
Q. Have you ever had occasion to examine critically the construction of the steamer "Queen of the Pacific"?
A. Yes, sir.
Q. Do you remember when that was?
A. I do not remember the date. I was through her very carefully at the time of the accident.
Q. What accident do you refer to?
A. The accident at the time she was sunk.
Q. At Port Harford?
A. At Port Harford.
Q. Was that examination sufficiently thorough to enable you to state whether or not the "Queen" was a seaworthy vessel at that time?
A. Yes, sir.
Q. As compared with other vessels, iron vessels, which you have examined on this coast, was the "Queen of the Pacific," in her construction, better or worse?
A. The "Queen of the Pacific" was a little stronger. There was a little more material in her than most of the vessels on this coast.
190 Q. From your examination of her, would you or not rate her as a thoroughly constructed iron steam vessel?
A. I consider the "Queen of the Pacific" a very well constructed vessel.

The COURT:

Q. Was she built by Cramps?
A. Yes, sir.

Mr. TOWLE:

Q. About how shortly after the accident at Port Harford did you make your examination of the "Queen"?
A. Immediately when she came back. She came right over to the Union iron works immediately.
Q. Was that examination made upon the dock?
A. Partly afloat and more thoroughly on the dock.
Q. Did she at that time show evidences of having been aground?
A. Yes, sir.
Q. Now, leaving out of account the evidences of what appeared as the result of her grounding, did anything appear tending to show that the "Queen" was otherwise than a thoroughly seaworthy vessel?
A. No, sir.
Q. Do you remember to have made any examination of the steamer prior to that time?
A. There is one place in the steamer that you can never see except when the boilers are out, and that is under the boilers; that is

the only time I saw the "Queen" under the boilers. I had been all through the "Queen," except under the boilers, and I was under the boilers at that time.

Mr. ANDROS:

Q. What time do you mean by prior to that time?
A. I mean prior to the accident at Port Harford.

The COURT:

Q. You never saw her under the boilers until after the accident?
191 A. Yes, sir, we took the boilers out of her.

Mr. TOWLE:

Q. Barring the effects of apparent grounding, was there anything to indicate unseaworthiness in the condition of the "Queen" under the boilers when you made your examination?
A. No, sir, she was in remarkably good condition.
Q. Prior to that time, you had examined her in every other part?
A. Elsewhere, yes, sir.
Q. How long prior to that time do you remember?
A. I don't know. I generally take a look through them when they come on the dock.
Q. About how often are they on the dock?
A. Once every eight months to a year.
Q. At none of those times, as I understand you, did you see anything to indicate that the vessel was otherwise than entirely seaworthy?
A. Nothing.
Q. How long is a vessel, of the construction of the "Queen" supposed to last in good condition?
A. If they are taken care of, sixty or seventy years.
Q. Do you know how the "Queen" was rated?
A. I don't recollect the reading in the book. I know she is a first-class vessel.
Q. From your knowledge of her construction, assuming that she received reasonable repairs for wear and tear as she went along, how long would you judge her hull should remain a seaworthy hull?
A. If it is taken care of, fifty or sixty years. If properly repaired, properly attended to, and properly painted.
Q. Would your observation and examination of the "Queen" enable you to state whether or not she had been properly
192 cared for from the time she was built until you made the examination of her of which you have spoken?
A. Yes, sir.
Q. What do you say with reference to that?
A. The "Queen" was in remarkably good condition under both the boilers and engines, and that is the place in an iron ship that goes first.

Q. Did her hull at that time in any part show any evidence of any neglect whatever attending it?
A. No, sir.

Cross-examination.

Mr. ANDROS:

Q. Mr. Dickie, if a ship should spring a leak to such an extent—I will take this very vessel—if the "Queen of the Pacific" sprung a leak at one o'clock in the morning or thereabouts, and sunk the same morning at one o'clock in consequence of a leak in her, and then in four days afterwards was raised and pumped out and able to make her trip up here to San Francisco without leaking, as a ship-builder, would you not infer that whatever leak had been in her had been stopped?
A. Yes, sir.

FREDERICK BARRY, called for the respondent, sworn.

Mr. TOWLE:

Q. What is your occupation?
A. Claim clerk of the Pacific Coast Steamship Company.
Q. How long have you been connected with the Pacific Coast Steamship Company?
A. A little over nine years.
193 Q. Are you able to state how frequently the Pacific Coast Steamship Company dispatched vessels for San Diego and way ports in 1888?

Mr. ANDROS: I object to that. I do not see what their dispatching other vessels has to do with this case. I do not see what bearing it has.
The COURT: I overrule the objection.
Mr. ANDROS: Note an exception.

A. Yes, sir; from a memorandum that I have taken of the sailings of these vessels.

Mr. TOWLE:

Q. How frequently did vessels sail at that time?

Mr ANDROS:

Q. Who kept the memorandum of the sailing of vessels?
A. The commanders of the vessels.
Q. Where was that memorandum kept, in a book in the office?
A. It is a report turned into the office on the completion of each trip.
Q. And you made your memorandum from these reports?
A. Yes, sir.

Mr. ANDROS: I will not object to it.
The WITNESS: There was a regular passenger steamer every three days and several freight-boats besides.

Mr. ANDROS:

Q. Of what year are you speaking?

A. 1888.

Mr. TOWLE:

Q. Are you familiar with the way in which business is done upon the wharf of the Pacific Coast Steamship Company, or was done at that time, I mean in so far as the receipt of merchandise for
194 transportation for San Diego or way ports, and forwarding of that merchandise?

A. Yes, sir.

Q. What was the custom as to receiving and forwarding merchandise for those ports at that time?

Mr. ANDROS: I object to that. If they can prove how these goods were received and forwarded, it is all right, but I do not think they can go into a question of what the custom was.

Mr. TOWLE: The object is to show that the thirty days' clause is reasonable under the facts of the case.

Mr. ANDROS: Then I will withdraw the objection.

A. Freight was received and forwarded on the next steamer sailing. Occasionally the regular steamer was not able to carry her freight and a special freight-boat had to be dispatched.

Mr. TOWLE:

Q. Was it or not customary to clear the wharf on the departure of each steamer?

A. So far as possible. Sometimes there was more freight received than could be loaded on a certain steamer; then a freight-boat would be dispatched.

Q. Intermediate of the sailing of the regular steamer and the following?

A. Yes, sir.

Q. Was that custom through all of 1888?

A. So far as I know, yes, sir.

Q. Have you a memorandum or list of the vessels that sailed from January until May, 1888?

A. I have one from the 1st of March to the end of May—to the 1st of June.

Q. How many vessels sailed during that time?

A. Forty-nine.

Q. That is from the 1st of March?

195 A. From the 1st of March to the 1st of June, inclusive, three months.

The COURT:

Q. From San Francisco?

A. Yes, sir.

Mr. TOWLE:

Q. San Diego and way ports?

A. Yes, sir, San Diego and way ports; destination for San Diego.

Cross-examination.

Mr. ANDROS:

Q. Were you in the employ of the Pacific Coast Steamship Company at the time that you speak of?
A. Yes, sir.
Q. Did you receive the merchandise on the wharf?
A. No, sir.
Q. Who did, do you know?
A. Various clerks on the wharf.
Q. What was your special business as connected with the company?
A. I had no special business. I was not engaged on any vessel.
Q. You were in their employ doing something for the company?
A. Yes, sir.
Q. What was it?
A. I was making adjustments of grain cargoes; weights of grain cargoes.
Q. Had you not anything to do with the reception of goods at all?
A. None whatever.
Q. No supervision of the merchandise that was received or sent away?
A. No, sir.
196 Q. It was no part of your duty, then, to know when goods were sent away, or where they were put in warehouse, was it?
A. I do not quite understand you.
Q. It was no part of your duty to be informed or to inform yourself in respect as to how long goods remained upon the wharf, or whether they were put in warehouse and remained some time there was it?
A. There was no warehouse in connection with it.
Q. Does not the company have a warehouse at all?
A. No, sir.
Q. No shed?
A. Yes, sir, where the freight is received and loaded on the ship.
Q. When it is not forwarded on the ship that sailed immediately after it is received, or the next ship that sails after it is received, it is kept in the shed until they can dispatch it on another vessel.
Q. You had nothing to do with that?
A. Nothing.

FRANK J. CROGHAN, called for respondent, sworn.

Mr. TOWLE:

Q. What is your occupation?
A. Marine engineer.
Q. How long have you been engaged in that?
A. As a marine engineer about seven years.
Q. What position do you hold now?
A. First assistant engineer.

Q. How long have you been first assistant?
A. About three years.
Q. Do you know the steamer "Queen of the Pacific"?
197 A. Yes, sir.
Q. Were you employed on board of that vessel in 1888, at the time that she met with a misfortune on her trip to San Diego?
A. Yes, sir.
Q. At the time that she took the beach at Port Harford?
A. Yes, sir.
Q. In what capacity were you engaged on board the "Queen"?
A. As a water-tender.
Q. What are the duties of a water-tender?
A. To look after the boilers, the ship's pumps, and the bilges.
Q. In doing that is it or not necessary that you pass frequently around through the engine-room?
A. Yes, sir.
Q. Different parts of the engine-room?
A. Yes, sir.
Q. Do you remember what watch you were on the night that you left port on that trip?
A. Yes, sir.
Q. Which was it?
A. From 12 to 4.
Q. You went on at 12 o'clock midnight?
A. Yes, sir.
Q. And stayed until 4 o'clock in the morning?
A. Yes, sir.
Q. While on watch at that time, did you discover anything connected with water in the ship which was the occasion of any report by yourself?
A. I do not quite understand you.
Q. While on watch at that time, did you discover anything connected with water in the ship which was the occasion of your making a report concerning it?
A. Yes, sir.
198 Q. What was it?
A. A small amount of water on the floor of the engine-room in a place that should have been dry.
Q. At what time did you discover that?
A. About ten minutes after 2 in the morning.
Q. Where did that water appear to come from?
A. After searching about to look to find the cause of it, I found it coming through a small hole in the bulkhead overhead, where it had dropped.
Q. That is over your head?
A. Yes, sir.
Q. About what position was that hole with reference to the floor of the between-decks? Could you tell from where you were?
A. No, sir, not exactly.
Q. Where was this hole?

A. It was in the bulkhead, and was at one time intended to secure a pipe to the bulkhead by a strap.

Q. Is this bulkhead wood or iron?

A. Iron bulkhead.

Q. That encloses the entire engine-room?

A. No, sir, it encloses one side, the starboard alleyway.

Q. There is an iron bulkhead all around the engine-room?

A. Yes, sir, with doors fitted to it.

Q. This bulkhead was a bulkhead between the engine-room and the starboard alleyway?

A. Yes, sir.

Q. With reference to the top or bottom of that bulkhead, what was the position of this hole?

A. I could not state exactly.

Q. Was it near the top of it or near the bottom of it?

A. It was very near the bottom.

199 Q. How large was that hole?

A. As I remember, not more than three-eighths or half an inch in diameter.

Q. Was it as large as that?

A. I don't know for sure.

Q. When you discovered the water there, how much water would you judge had found its way to the floor of the engine-room or to the place where you discovered it?

A. I should judge not more than half a gallon of water spread over a surface of about three feet square.

Q. It was a surface of about three feet square that was wet, you mean?

A. Yes, sir.

Q. Was that all the water that had come, or had it run off from that surface?

A. No, sir; that was all that had come at that time.

Q. Which covered that three feet of surface?

A. Yes, sir.

Q. Was the water coming there? What attracted your attention, the wet surface under your feet, or the water dropping down?

A. The wet surface.

Q. At that time was water coming out of this hole of which you have spoken?

A. No, sir.

Q. How soon, if at all, did the water come out of that hole after you saw this wet surface?

A. It was perhaps a few minutes; not until the ship had rolled heavily to port that it came through the hold.

Q. Then, did it continue to flow, or was it intermittent?

A. It was intermittent; when the ship got on an even keel, or lay over to starboard.

Q. Then would it cease?

A. Yes, sir.

200 Q. Did it afterwards become permanent?

A. I don't remember, sir.

Q. Did you continue to observe that place, or was your attention taken elsewhere?

A. My attention was taken elsewhere.

Q. What was the condition of the vessel as to having a list at the time that you first discovered this water?

A. I don't remember.

Q. Do you remember whether anything connected with that had made any impression upon you prior to that time?

A. Well, the list occurred very often from one side to the other, so often that we just made it all right as quick as we could, and that was all.

Q. Nothing had impressed you as unusual up to that time?

A. No, sir; nothing unusual.

Q. After this did the vessel acquire a list?

A. Yes, sir.

Q. That became noticeable to you?

A. Yes, sir.

Q. How soon after this?

A. That I could not say how soon after. It seemed inside of an hour.

Q. Did that list when it became noticeable remain stationary, or did it increase or decrease?

A. It increased continually from that time on until we left the vessel.

Q. What effect, if any, did this list have on the boilers in so far as generating steam is concerned?

A. It made it almost impossible to work them, to fire the port boilers; the fire would not stay inside; nothing would stay in there.

The starboard fires could be handled as usual.

201 Q. You could keep steam up in the starboard boilers?

A. Yes, sir.

Q. Could you in the port boilers?

A. In the port boilers we could not.

Q. About what time in the morning, if you remember, did it become impossible to keep up steam in the port boilers?

A. I don't remember.

Q. About how long before you reached Port Harford, would you judge?

A. I don't remember. I don't remember what time we reached Port Harford either.

Q. Was there anything which interfered with keeping up steam in those boilers except the list?

A. I am not sure. I don't remember now.

Q. You don't remember anything?

A. Not now.

Q. To whom did you report that water was coming into the engine-room through this hole of which you have spoken?

A. To the assistant engineer in charge at the time.

Q. Do you know whether anything was done in the engineer's department with a view of checking that?

A. Yes, sir; everything possible.

Q. Did the vessel maintain her headway until she took the bottom at Port Harford?

A. Yes, sir.

Cross-examination.

Mr. ANDROS:

Q. As I understand, Mr. Croghan, you were in the engine-room and noticed some water on the floor, where it ought to have been dry instead of being wet?

A. Yes, sir.

202 Q. You found this water was dropping from a hole. Was that hole in the between-decks?

A. Through the bulkhead of the between-decks.

Q. You inferred from that that the leak was somewhere in the between-decks or in that neighborhood?

A. Yes, sir.

Q. It kept on increasing until the vessel got a heavy list to starboard?

A. Yes, sir; the ship listed all the time. I don't know the exact cause of it; I didn't at the time.

Q. Was she listing any when you first discovered this wet floor?

A. Nothing unusual; not to me.

Q. How long was it after you first discovered the wet floor that she did take a list that you noticed?

A. I am not sure. It may have been an hour before I noticed it; it may have been longer.

Q. Then she continued to list more and more heavily until she finally took the bottom at Port Harford?

A. It seemed so to me.

Q. You spoke of everything being done to stop this leak by the people in the engine-room, or to remedy the leak. What was done, if you please?

A. We had valves and connections, and leading to the pipes donkey pumps and main pumps to be used in such cases. They were all used as they should be, properly used.

Q. Where had the water gathered; under the floor or next to the skin of the ship or in the engine-room? What place was it pumped out?

A. It was pumped from the engine-room and also from the after hold at the same time.

203 Q. Was there much water in her when you got the pumps at work?

A. The pumps were working continuously before the water was discovered.

Q. You do not mean before the water was discovered?

A. Yes, sir. There are pumps working all the time connected with the main engine, whether there is anything to pump or not. The pumps work when the engines work.

Q. Are those pumps connected with different departments where water might accumulate?

A. Yes, sir. Water can be taken from any part of the ship by those pumps.

Q. What I want to know is, are these pumps attached for the purpose of keeping the ship free of water and working all the time in case there might be water there?

A. Yes, sir.

Q. How many of them?

A. Two, to the main engines.

Q. How many pumps did you work after you discovered water?

A. The donkey pump; also the circulator and the centrifugal pump; two donkey pumps and the centrifugal one.

Q. Did she get so much water in her, or did she list to such an extent that you could not work the donkey pump?

A. No, sir, everything worked all the time.

Q. Clear up to the time that she went down?

A. Yes, sir.

Q. Did there seem to be a good deal of water in her when the pumps got to working?

204 A. I don't remember.

Q. What time did she get into Port Harford?

A. I don't remember the time, except it was after daylight.

Q. After she took this list to starboard, did her speed decrease until she got into Port Harford?

A. I don't know if the decrease was steady. She decreased after those boilers became unmanageable.

Q. Was there any trouble with her fires in the starboard boilers after she got such a list to starboard?

A. They could be used all the time, but they would have been much better if the boat was on an even keel.

Q. Do you know whether the engines stopped working before or after she took the bottom at Port Harford?

A. I am not satisfied the engines worked all the time; I am not sure; but it seems to me that they did.

Q. The question is, whether she took the bottom and then the engines stopped, or whether they stopped immediately before. Do you recollect about that?

A. No, sir, I do not.

The COURT:

Q. I understood you to say that these pumps reached every part of the ship. Did they reach into the alleyway?

A. No, sir; every part of the ship's bottom.

An adjournment was here taken until tomorrow, Wednesday, May 13, 1896, at 11 o'clock a. m.

WEDNESDAY, *May* 13, 1896.

CHARLES GOODALL, called for the respondent, sworn.

Mr. TOWLE:

Q. Captain, you were connected with the Pacific Coast Steamship Company in 1888?

205 A. Yes, sir.

Q. In what capacity?

A. President of the company.

Q. What, if anything, had you to do with the vessels belonging to the company?

A. General management.

Q. Of the steamship company?

A. Yes, sir.

Q. In connection with that had you anything to do with the superintendence or direction of repairs on vessels?

A. Yes, sir, altogether.

Q. Do you remember the steamship "Queen of the Pacific"?

A. Yes, sir.

Q. Do you know when she was built?

A. She was built in 1882.

Q. Where?

A. Philadelphia.

Q. By whom?

A. By Cramps.

Q. Were you present at the time she was constructed?

A. More or less.

Q. Are you conversant with the structure of iron vessels?

A. More or less, yes.

Q. Was this vessel constructed under your substantial supervision?

A. Yes, sir.

Q. What was the character of the vessel at the time she was turned over to the Pacific Coast Steamship Company by the builders?

A. The character of the vessel was first-class in the Bureau Veritas.

Q. Did she hold any certificate from that bureau?

A. Yes, sir; you have it in your hand.

Q. From your own knowledge of the steamer "Queen,"
206 what was her class? How should she rate at the time she was turned over by the builders to the Pacific Coast Steamship Company?

A. She was a first-class ship in every particular.

Q. You state that from your own knowledge and observation?

A. Yes, sir.

Q. Could you give the date at which she was turned over to the Pacific Coast Steamship Company?

A. No, sir, I cannot give you the date. It was in 1882 that she was turned over to the Oregon Improvement Company, who are the proprietors of the Pacific Coast Steamship Company. She was subsequently transferred to the Pacific Coast Steamship Company, but I have not the date.

Q. At what date was she turned over to the Oregon Improvement Company?

A. In the year 1882—April, 1882.

Q. From that time until the 1st day of May, 1888, was she within your control and supervision?

A. Yes, sir, under our management all the time.

Q. Has she been kept up?

A. She has always been kept up to her original classification. She has the same classification now in the insurance company as she did when she was launched.

Q. You remember the occasion or the time of her misfortune at Port Harford on your trip from San Francisco to San Diego sailing from here on the 29th of April, 1888?

A. Yes, sir, I recollect.

Q. What was the condition of the "Queen" at the time she sailed upon that voyage?

A. The same as it always has been.

Q. How frequently after she came under your control did you have occasion to examine the "Queen"?

207 A. About once every nine months we would take her on the dock, clean and scrape her bottom and paint her and she undergoes an examination of her hull; at other times an occasional visit, looking around and seeing everything that is necessary to be done is done, and an order for repairs or otherwise to keep her up to her regular classification.

Q. Do you remember the last time prior to the 30th of April that you made an examination of the vessel?

A. I do not remember any particular examination made in reference to it, only I have done it repeatedly and always when necessary. When her bottom was foul she would be put on the dock and cleaned, and we would always take a look at her to see what was the matter.

Q. In 1888, Captain, what was the custom of the business so far as shipping merchandise from San Francisco received for San Diego and way ports?

Mr. ANDROS: I object to the question. If it is to control in any way the bills of lading, I object to it. I do not see the materiality of the question. We have nothing to do with the custom of the shipping.

Mr. TOWLE: I wish to show that this thirty days' clause is reasonable under the circumstances of this case.

Mr. ANDROS: That is all right. I did not know the purpose of it.

A. It was received on the dock by a freight clerk ordinarily and shipped by the first vessel that went.

Mr. TOWLE:

Q. What is this paper shown you, entitled "Bureau Veritas" (handing)?

A. Bureau Veritas is an organization that looks to the classification of vessels, and gives a certificate to them by the act of

208 their surveyors when found to be worthy.

Q. What is this paper?

A. That paper is the certificate of the surveyor, and the certificate from the society itself, Bureau Veritas.

Q. Issued to whom and for what vessel?

A. That is for the "Queen of the Pacific." That was the certificate that she was sailing under at the time of the misfortune.

Mr. TOWLE: We offer this certificate, if your honor please.

Mr. ANDROS: We object to it as incompetent and inadmissible, for the reason that it is the survey of some surveyors, and we do not know anything about what the examination of the vessel was. It is mere hearsay. It is not a certificate of any official body whose acts can be recognized by a court of justice. Surveyors' surveys are never allowed in evidence unless the parties who made them are called to testify.

(After argument.)

Mr. TOWLE: I offer this certificate to show—for what it may be worth—that this board did at this time, or prior to this time, issue a certificate for this vessel.

The COURT: That you have already in the testimony.

Mr. TOWLE: The certificate is the best evidence of that fact. Captain Goodall has testified that in that certificate the vessel rated at a certain rate. I offer in connection with that testimony the certificate which they issued.

The COURT: I do not think it is admissible under the rule of law. I sustain the objection.

Mr. TOWLE: We will take an exception.

209 Cross-examination.

Mr. ANDROS:

Q. Captain Goodall, you have testified that the merchandise when it was brought onto the wharf for shipment for San Diego and way ports was received by a freight clerk?

A. Generally, yes.

Q. Was that freight clerk in the employ of the Pacific Coast Steamship Company?

A. Yes, sir.

Q. You have spoken of having examined this vessel from time to time. The general examination or careful examination of her was made when she was on the dock, I suppose, for the purpose of being cleaned and painted?

A. Yes, sir.

Q. Afterwards any examination that you made was simply a casual one and making a general observation of her?

A. Generally looking around and seeing if anything was the matter.

Q. Seeing if there was anything out of the way which was in sight?

A. Yes, sir.

Q. How frequently did you look around generally to see if anything was out of place?

A. Just as it happened; perhaps once every voyage and at other times not. Just as I had opportunity and time.

Q. That examination was not intended to be a critical one, but only a general one?

—. ——.

Q. Just looking around to see if there was anything out of the way or anything that needed repairs?

210 A. The engineer and captain make reports to me, and if there is anything in those reports that indicate it is necessary for me to go and look, I go and look. I go voluntarily of my own accord sometimes. I look around to see if anything is the matter when she is sailing, sometimes, and also when she arrives, or any time that I have time.

Q. If you see anything out of the way you have it attended to?

A. Yes, sir.

EDWIN GOODALL, called for the respondent, sworn.

Mr. TOWLE:

Q. You are associated with the Pacific Coast Steamship Company?

A. Yes, sir.

Q. And were in 1888?

A. Yes, sir.

Q. In what capacity?

A. I was secretary of the company.

Q. Were you at the same time a member of the firm of Goodall, Perkins & Co.?

A. Yes, sir.

Q. And were they at that time operating the "Queen of the Pacific"?

A. Yes, sir.

Q. Are you familiar with the course of the business of the Pacific Coast Steamship Company in forwarding merchandise received for shipment from San Francisco for San Diego and way ports during the year 1888?

A. I am.

Q. What was the ordinary procedure in that regard?

A. In what respect?

Q. As to the length of time, after merchandise was received, before it would be forwarded.

A. The regular steamer sailed every fourth day, and ordi-

211 narily we would clean up all there was received up to the hour of her sailing.

The COURT:

Q. The fourth or third day?

A. I think every fourth is my recollection.

Mr. TOWLE:

Q. Passenger steamers?

A. Yes, I think so; every fourth or third day.

The COURT: Mr. Barry testified every third day.

Mr. ANDROS: There is no contradiction of Mr. Barry's testimony about the time these vessels sailed.

The COURT: I only called Mr. Goodall's attention to the fact that Mr. Barry said every third day regularly, and there were additional steamers.

Mr. ANDROS: It is immaterial to us. Mr. Towle may have it every third day or every fourth day.

Mr. TOWLE: I will ask leave to read the sailing day of vessels from the 1st of March, 1888, to the 1st of June, 1888.

Mr. ANDROS: It seems to me that the testimony of the witness who testified yesterday covers that whole ground. It is hardly worth while to encumber the record with memorandum of the dates exactly. The witness testified they sailed usually every third day, regular steamers, and sometimes when they had an abundance of freight, more than they could send forward by those boats, they put on an extra freight-boat.

The COURT: I apprehend it will not encumber the record very much.

Mr. TOWLE: I will just read the dates of sailing: March 1st, 2nd, 4th, 6th, 8th, 8th, 11th, 12th, 16th, 17th, 17th, 20th, 22nd, 23rd, 24th, 27th, 27th, 30th; April 2nd, 2nd, 3rd 5th, 8th, 11th, 12th, 13th,
212 14th, 17th, 19th, 20th, 23rd, 24th, 26th, 29th, 30th, 30th; May 2nd, 6th, 9th, 9th, 12th, 13th, 15th, 16th, 20th, 24th, 28th, 28th; June 1st.

Mr. ANDROS: If your honor please, it seems to me that should be struck out, because we find two vessels sailing on the third day, and it does not appear whether they were passenger-boats or freight-boats, and it does not appear whether they were all going to San Diego.

The COURT: Mr. Barry testified yesterday that whenever there was more freight than passenger vessels could take they dispatched a freight-boat.

Mr. ANDROS: Yes. It does not appear here but what those were regular passenger steamers. I do not suppose it makes any difference. I withdraw my objection to it.

No questions.

An adjournment was here taken.

(Endorsed:) Filed June 1st, 1896. Southard Hoffman, clerk, by J. S. Manley, deputy clerk.

Testimony. Filed June 4th, 1896.

MONDAY, *June* 1, 1896.

A. H. EVANS, called for the plaintiff, sworn:

Mr. TOWLE:

Q. Mr. Evans, you are employed by Goodall, Perkins & Co.?

A. Yes, sir.

Q. And you were in their employ in the year 1888?
A. Yes, sir.
Q. And prior to that time?
A. Yes, sir.
Q. In what capacity are you employed by that firm?
A. As correspondent and general secretary.
Q. And you were so employed during the time I have just mentioned?
A. Yes, sir.
213 Q. In that position, do protests made by shippers sending goods by the Pacific Coast Steamship Co.'s steamers, with reference to the manner in which the business is conducted, come under your observation?
A. I would open any complaint that might come addressed to Goodall, Perkins & Co.—any letters or complaints.
Q. You would know of any matter of that kind that came to Goodall, Perkins & Co.?
A. They would come under my personal observation, yes, sir.
Q. Within your observation has any shipper made any protest against, or by reason of what is known as the time clause, or 30-day clause, contained in the shipping receipts in use for that company?

Mr. ANDROS: If your honor please, we object to that as incompetent and immaterial. What have the objections of other people to do with damage to our goods, or with this 30-day clause of these bills of lading?

The COURT: I suppose it is for the purpose of showing whether or not that clause is reasonable. I suppose the claim on the part of Mr. Towle is, that if it was an unreasonably short time there would have been complaints made to that effect.

Mr. ANDROS: That would not follow by any manner of means. What one person might suppose was a reasonable time another might suppose was an unreasonable time. There is just as much difference in the opinions of merchants as there is in the opinions of courts. I do not see how that can affect us, simply because no one has ever protested against the time clause. Perhaps this
214 may be the first time that that question ever arose, or the first time anything of the sort came up. I do not see how it is competent to prove that that is a reasonable custom because no one has ever objected to it.

Mr. TOWLE: If your honor please, we show that this is the shipping receipt in common use, as appears here, the contract that is presented to shippers to sign, and which they do sign. Then we show that no shipper has ever objected to the contract upon the ground that it did not give him a reasonable time within which to present his claims in the event of loss. And we say that there is a circumstance going to show the reasonableness of this contract; that it is in general use and accepted by everybody as furnishing a reasonable time. Otherwise, some protest would have been made against signing a receipt or a contract with — clause in it. There are decisions which state that where it appears that these contracts are in

general use, received and acted upon generally, without objection, that that is a circumstance going to show that the contract is in fact reasonable, for the reason that it is treated as being so by the people who are called to act upon and in connection with it, or under it.

The COURT: I think, Mr. Towle, that if this were a suit against the Pacific Coast Steamship Company, or any of the stockholders, that the evidence would be admissible. But if I remember correctly, I held that this suit was against the steamship "Queen." I think I have ruled upon that question.

Mr. TOWLE: I understand, but before your honor rules upon the question now before the court, I will call your attention to
215 the fact that a claim for loss cannot be presented against the ship, under this clause. That contract just be construed to be not reasonable within the intendment of the parties who make it. It cannot be supposed that the ship herself was to respond to a claim. Her agent, somebody, must respond to it. The claim must be presented to somebody representing the ship. And this relates to the 30-day clause within which the claim shall be made. So we say that we have a right to show that that clause is reasonable; that is, that it was never objected to by anybody.

Mr. ANDROS: It seems to me, if your honor please, that the evidence offered is incompetent under several rules. One of them is that which your honor suggested. I was about to comment upon that slightly. Your honor has held that this 30-day clause does not apply to a proceeding *in rem*. No action shall be maintained or claim presented to the company unless presented within 30 days after the action, is the effect of that clause. We do not proceed against the company. We make our claim against them, as a party always has the right to make its claim under such circumstances. If this had been a proceeding against the company or against the stockholders, then I say the question of the reasonableness of the time would be an element. But here the suit is not against the stockholders, then I say the question of the reasonableness of the time would be an element. But here the suit is not against the stockholders, or against the corporation. It is a proceeding *in rem* against the vessel, and there is nothing in that bill of lading which says that you shall not commence a proceeding *in rem* within 30 days. Your honor has held that that applies in this case—
216 that the clause does not apply to a proceeding *in rem*. That being so, how can we be affected because somebody else has not chosen to object to that 30-day clause? We did not proceed against these parties *in personam;* we proceeded against the *res*. Therefore, that 30-day clause has no application whatever. And, that clause having no application to this case, nothing which other people have done under it can affect this case; because, if the clause itself is not material to this case, nothing which people have done under it is applicable, and whether they have made complaints under it or not, cannot affect this case at all. The whole thing drops out of consideration, in every form. More than that, as I suggested before, we are not bound by the objections of other people.

That could not help this proposition. Suppose they had objected. It is not to be supposed that the steamship company are going to alter their method of doing business because somebody objected to it. But however that may be, it seems to me that the suggestion which your honor made is conclusive of the matter.

The COURT: I think, Mr. Towle, that I have passed upon this question in the ruling I have heretofore made upon the demurrer.

Mr. TOWLE: I do not think, if your honor please, that you passed upon this exact question. But even though your honor has passed upon it, we think we should be entitled in this proceeding to show what we now seek to show. Your honor has intimated, as I understand you, that this contract is unreasonable in itself, which may be an independent reason why, or might have added something to the willingness of your honor in holding this contract as strictly as you did with reference to a suit against the steamer. I say I think we should be entitled to show the court, under those conditions—because I suppose the case, no matter what the result may be here, will go to the court of appeals—the facts in connection with this matter, so as to avoid the necessity of further trial in any event. We offer the evidence for what it may be worth; as an explanation of the reasonableness of this contract. Your honor has held, of course, that these stipulations do not inure to the benefit of the ship. Holding that, you might just as well wipe this whole contract out of existence.

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The COURT: That is so, apparently.

Mr. TOWLE: You might just as well wipe this contract out of the case, if you hold that stipulation as not applying to and binding upon the shipper. The result is that here are people carrying on this business, contracting with a limitation of liability, and utterly failing to accomplish that which they had in view. In that view of the case, I suggest to your honor that it would be no more than the exercise of a reasonable latitude, to allow us to make the proof which we tender here by this witness.

The COURT: If you offer the proof, the result will be the same, as the offer will go into the record.

Mr. TOWLE: But it does not enable the court of appeals to pass upon the question.

The COURT: If the court of appeals determine that I am wrong in this matter, they would certainly reverse me on the ground that you offered to prove it, and it might be better than if the witness was examined. I think I shall have to rule that the evidence is not proper here, and sustain the objection.

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Mr. TOWLE: We take an exception. That is all, Mr. Evans.

Mr. TOWLE: There is one other matter of which I wish to speak, in reference to the testimony already taken. In looking over the record, I see that the reporter has written into the record what took place with reference to the question asked by your honor the other day, upon which your honor asked if there was any objection, and upon an objection being made, you withdrew the question. I ask that all relating to that be stricken from the record.

Mr. ANDROS: I do not think it ought to be done. It is a judicial

proceeding. Why should it be stricken out? Your honor's question was objected to. That was all proper enough. Then, not content with that, counsel wanted the question withdrawn. Your honor withdrew the question. This is the first time that I ever heard that everything connected with a question withdrawn or a question objected to, should be stricken out of the record. I submit that it should stand in the record.

The COURT: I suggest to you that it might properly be withdrawn from the record. So long as there is a stenographer to take the proceedings, it is but natural that he should take it down. But, as a personal matter, I would prefer now to have it out of the record.

Mr. TOWLE: The stenographer wrote up all the proceedings that took place. We submit that, beginning with your honor's suggestion that you have a question to ask which may be objected
219 to, down to the point in the record where the question was withdrawn, it should all go out of the record, because, as a matter of course, when the question itself is withdrawn, that would follow.

The COURT: The best I can do is to say that I would suggest that that matter be withdrawn from the record entirely. If Mr. Andros desires to object to its being withdrawn, it will have to remain, because he is entitled to have the record complete. For the purpose of the record I will say that I suggest to counsel that the whole of the matter alluded to by Mr. Towle, relative to the question asked by the court, be withdrawn from the record.

Mr. ANDROS: Does your honor so order?

The COURT: No, I do not make that order. I simply make it as a suggestion.

Mr. ANDROS: I do not agree to it.

The COURT: Then I suppose it will have to remain. You will have the benefit, Mr Towle, of my expression, that I think it ought to be out of the record.

Mr. TOWLE: I take it, if your honor please, that if there were no shorthand reporter here to take these proceedings down, and we were relying upon your honor's notes and the testimony, that your honor would then strike it out, and that it would not constitute a part of your honor's notes. I think your honor has the same control over this record that you would have over your own minutes of the court. The reporter is here as your secretary, subject to your order. This question was suggested by your honor, not by me, and opportunity was given to us to say whether we desired that the question should be asked. It happened that your honor stated that the question might be objected to by counsel. Following
220 your honor's statement, we objected to the question. Your honor then withdrew the question, and that withdrawal was acceded to. It seems to me that upon that state of facts, the question and the statement in the reporter's transcript with reference to it should logically be all taken out of the record. It was not a question asked upon our part. It was a question which the court proposed to interject, unless one side or the other desired it otherwise.

On an objection, or an intimation by counsel that one side did not desire it, the court withdrew it.

Mr. ANDROS: Suppose the witness had answered the question, and then there had been a motion to have the answer stricken out. Your honor could of course order it stricken out, but the record should remain with the question and answer, showing the ruling of the court striking it out. The suggestion has been made that if your honor had been taking these notes, they would be your notes. The notes are a record of the case, of course. The statute provided that your honor shall keep notes of the trial of an admiralty case. That is the only way that a record can be made of the testimony. It does not matter whether your honor makes it, or whether it is made by a stenographer acting for your honor. It is the record of a judicial proceeding, and a record which both parties have a right to.

The COURT: I will let it stand, together with what I have said this morning concerning it.

Mr. TOWLE: We reserve an exception to the ruling of the court.

221 R. B. HOOPER, called for the plaintiff, sworn.

Mr. TOWLE:

Q. Mr. Hooper, what is your business?
A. Average adjuster.
Q. At San Francisco?
A. At San Francisco.
Q. How long have you been in that business?
A. In San Francisco?
Q. Yes.
A. Nine years.
Q. Do you remember the occasion of the misfortune to the steamship "Queen of the Pacific," in April or May, 1888?
A. I do.
Q. Had you anything to do with the adjustment of losses—the average adjustment, connected with that misfortune?
A. Yes, sir.
Q. In what capacity had you to do with that matter?
A. In my capacity as average adjuster employed by Goodall, Perkins & Co.
Q. What procedure was adopted as a preliminary to those adjustments?

Mr. ANDROS: I do not see the competency of this testimony about the average adjustment, if your honor please. There is no question of average adjustment here at all. I do not see the pertinency of going into how the average adjustment was made. The first question that would arise is, whether the average adjustment is admissible, or whether anything concerning it is admissible. The mere matter of asking the witness whether there was an average adjustment made out, to which he answered yes, and then the average

adjustment is produced and offered in evidence, is one thing. When they attempt to get in evidence what is preliminary to it, they
222 might just as well prove then as afterwards that the paper is admissible. It does not seem to be anything leading up to anything. We object, therefore, to going into the contents of an average adjustment, or what will lead up to it, until the question of how that average adjustment is competent and admissible testimony, is settled.

Mr. TOWLE: What we propose to show by this witness, if the court please, is the fact that notices were sent to all the consignees of merchandise on that ship, at as early a date as May 2, 1888, calling their attention to the misfortune of the "Queen," and to the necessity of consignees and owners signing a general-average bond as a preliminary to receiving their merchandise. Following that up, we propose to show that Hellman, Haas & Company, and the Bancroft-Whitney Company, came in and signed those general-average bonds. Those proceedings being a direct statement on the part of the company which was the owner of the vessel that this was a general-average loss, a loss by peril of the sea, it therefore put these people upon notice to make their claims against the company within the limit time.

The COURT: You say that notice was sent upon May 2, 1888?

Mr. TOWLE: Yes, May 2, 1888, notices were mailed to all of these people.

The COURT: When was this action brought?

Mr. TOWLE: This action was brought April 28, 1892. Notices were sent out May 2, 1888.

Mr. ANDROS: I do not see how it is possible that this can be competent evidence. Suppose they did send out notices. They
223 undoubtedly did that for the convenience of the merchant, and their own convenience. The merchant could not get his goods until he either made a deposit of an amount specified which the shipper was willing to receive, or he had to sign this average bond. He had no election whatever. It was a thing that was forced upon him. Every time a ship comes in with a damaged cargo, the very first step is to notify the consignee or the shipper that if he wants his goods, he can sign a general-average bond; that is, that if it turns out to be a general-average loss, it will be paid. But the shipper is obliged to sign that bond before he can get his goods, and the average bond does not bind unless it is determined that it is an average loss. He is not bound by that average adjustment. Because they say, although the vessel was lost by the perils of the sea, if you want your goods, you sign an average bond. That is always the case. He signs that, but he does not agree to pay anything under it, unless it is ascertained, or he chooses to have it ascertained in a court of competent jurisdiction whether it is true, under the facts, that there was a general average or not, and whether the adjustment is properly made up. Your honor will recall the fact that only a few days ago we tried a case on a question of whether the average was properly made up or not. It does not bind anybody, but it is a mere matter of convenience to allow

the merchant to get his goods, and on the part of the ship to get a bond.

The COURT: I understand Mr. Towle to say that he proposes at this stage of the proceedings to prove when these notices were sent out for the consignees and owners to file a general average—when they were dated and sent out.

224 Mr. ANDROS: I think the witness has already stated that. No, I am mistaken; Mr. Towle stated it.

The COURT: I think it is admissible in that view, whatever relation it may have to this case, if any. I think it is proper for the court to be advised as to when that particular proceeding took place.

Mr. ANDROS: If your honor will allow me to make a single suggestion; it is going right back again to that 30-day matter.

The COURT: No, it is not admitted upon that ground, but upon the ground of the bringing of the suit, with respect to the four years' time. It may enter into the question of the statute of limitations. I will overrule the objection.

Mr. ANDROS: As to the date the notices were sent out?

The COURT: Yes. I will dispose of that now.

Mr. ANDROS: We take an exception, if your honor please.

Mr. TOWLE: Mr. Hooper, I show you a paper which I now mark "Claimant's Exhibit 4." I ask you to look at that, and state whether or not that is the form of notice which you sent out, as you have stated.

A. (After examination.) It is.

Q. That is a printed form, is it?

A. Yes, sir.

Q. Were the notices which you sent out all of the same character? Did they all contain the same printed matter?

A. They were printed exactly the same.

Q. Were they, or not, filled, so far as your memory goes, to suit each particular case?

225 A. They were filled to suit each particular case, yes, sir.

Q. Were they mailed on the date that this form bears?

A. They were mailed within 24 hours after that date.

Q. Where were they put into the mail, at San Francisco?

A. At San Francisco, yes, sir.

Q. And addressed how?

A. One addressed to each consignee.

Q. Where?

A. At the address given on the manifest?

Mr. TOWLE: We now offer this in evidence as an exhibit on the part of the claimant, to be marked "Claimant's Exhibit 4."

Mr. ANDROS: We object to it.

Mr. TOWLE: We offer it as showing the form of the notice—the printed portion of it.

The COURT: I will overrule the objection.

Mr. ANDROS: We note an exception.

Mr. TOWLE: I will read this notice, so that it may go into the record. (Reads:)

"Office of Johnson & Higgins, 315 California St.

"SAN FRANCISCO, *May* 2, 1888.

"DEAR SIR: The steamer 'Queen of the Pacific,' while on her late voyage from San Francisco to San Diego and way ports, sprung a leak and was beached in the bay of San Luis. She had on board consigned to you, as below:

"To facilitate the delivery and obtain possession of these goods, it will be necessary for you to appoint some one in this city to sign the bond for you and make a deposit on account of general
226 average of 15 per cent. of the invoice value of the goods. Please advise us in what company the goods were insured.

"Yours truly, JOHNSON & HIGGINS.

"H."

Q. That "H," stands for what?

A. Hooper.

Q. Yourself?

A. Myself.

Q. And with the exception of the memorandum of merchandise appearing on the manifest of the steamer at that time, this was the form of notice sent to all the consignees—the form of notice sent to Hellman, Haas & Company?

A. Yes, sir.

Q. And to the Bancroft-Whitney Company?

A. Yes, sir.

Q. In response to that notice, did Hellman, Haas & Company furnish a general-average bond?

Mr. ANDROS: I object to the question upon the ground that it is immaterial. Your honor suggested that there was a good reason why the date should be fixed. That has been done. Whether they furnished an average bond or not, is certainly not material. They had to give a general-average bond, presumably, or they would never have gotten their goods.

Mr. TOWLE: They might have left their goods.

Mr. ANDROS: Yes; they might.

Mr. TOWLE: If the court please, in this case, your honor has held that courts of admiralty are not strictly controlled by statutes of limitations existing in the State. It comes, then, to a question of what is laches in the particular case. It may be more than the statute of limitations, and it may be very much less than the
227 statute of limitations requires, depending upon the circumstances of the particular case, and as to whether or not the claim has been prosecuted in such a way as to give the other parties a reasonable opportunity to preserve all their rights in the matter. Here in this case, what we wish to show particularly is the positive assertion of a loss by peril at sea, on the part of the carrier, brought home to the owner of the merchandise immediately, and persisted in right through to the final consummation of the delivery of all the merchandise on this vessel. Having shown that, we certainly have shown that that would put these other people upon reasonable

promptitude in undertaking to enforce their claims, and that ordinary fair dealing would have required them to have questioned our assertion and notified us of the fact that they did not accede to it, prior to the time that the merchandise was taken into their possession and disposed of by them. So far as appears, we had no notice from these people up to the time this suit was brought, more than four years after. So far as appears, they asserted no claim as against us by reason of that loss until that length of time afterwards. Under those circumstances, I say that this all goes to show the attitude assumed by the agents for the vessel from the very start. The attitude assumed by the agents from the very start was, that this court, in its discretion, can say whether or not these people have pursued their claims with reasonable promptness.

Mr. ANDROS: If your honor please, there are two propositions here: The first is that because in this bond they have asserted that the goods were lost by a peril of the sea, therefore we are bound by that; that it is evidence to show that there was peril of the sea——

228 Mr. TOWLE: I did not say that.

Mr. ANDROS: I understood you to so state.

Mr. TOWLE: I said that it shows that we asserted that it was from a peril of the sea, which put you upon notice of your position, and places upon you the burden of contradicting that promptly, if you do not accede to it.

Mr. ANDROS: We were not bound to contradict that. We are not bound by a single statement in that average bond. It was really signed under duress. We had no choice except to leave our goods, or do as they told us to do. The expression here in the bond is: "To facilitate the delivery and obtain possession of these goods, it will be necessary for you to appoint some one in the city to sign the bond for you and make a deposit on account of general average of 15 per cent. of the invoice value of the goods." They say that in the bond which we were compelled to sign in order to get our merchandise. Counsel contends that, therefore, the recitals of that bond in respect to the perils of the sea, puts us upon notice that it was a peril of the sea. We were not bound by any such thing. We were not bound, because they stated that it was a peril of the sea, to take any notice of it at all. If we had been sued on that average bond, we would have come in and defended precisely as we are prosecuting here—that it was not a peril of the sea. We are not estopped by it. It has no effect upon our rights because they have that bond. Suppose they had written us a letter and said that these goods were lost by a peril of the sea, and we had paid no attention to it. I do not see that they can prove that it was a loss by peril of the sea because they so

229 stated and because we did not deny it on the spot. We had nothing to do with denying it. They said, "Come and sign this bond, and pay 15 per cent. of the invoice value, and you will get your goods; otherwise you will not." We had to sign it. Now, forsooth, they pretend to say that because they notified us that it was a peril of the sea, it has some effect, one way or the other, upon

our legal rights. They cannot make testimony for themselves in that way, and we object to this as incompetent and wholly irrelevant.

The COURT: I do not think that the construction of the average bond has anything to do with the acts of the owners of the ship or the libelants with respect to their claim, otherwise than it might be affected by the question of laches or bringing suit within the proper time. In this court it is not particularly a matter of time. The courts in such cases sometimes say that they will deem it laches on the part of a person who proceeds in this court, although the full length of the statute of limitations has not expired; that his conduct has been such that he is deemed to be guilty of laches. Then, again, although the persons have waited for a longer time than allowed by the statute of limitations, the courts have held that under the circumstances he has not been guilty of laches. So I think, that being the case, that the court is entitled to be informed as to all of the elements of the proceedings, so far as they involve the question of time and the conduct of the persons within that time. I shall, therefore, overrule the objection.

Mr. ANDROS: The objection is twofold. I would like to
230 have both objections ruled upon. One of the objections is that it in no way tends to prove that this was caused by peril of the sea.

The COURT: I do not think that you are bound by the statement contained in that notice, or whatever may appear in the bond, that this was a peril of the sea. All that this can be held to be evidence upon, under my ruling, is as to the notice which they gave that it was a peril of the sea; that is all.

Mr. ANDROS: We note an exception to the ruling of the court.

Mr. TOWLE: Will you repeat the question, Mr. Reporter?

Q. (Repeated by reporter.) "In response to that notice, did Hellman, Haas & Co. furnish a general average bond?"

A. They did.

Mr. TOWLE: Are you able to state the date at which they furnished that bond?

A. I think the date is in the bond. I do not know the exact date at the present time.

Q. Will you look at this paper which I will now mark "Claimant's Exhibit No. 5," and state whether or not this is the bond of which you have spoken, given by Hellman, Haas & Co.?

A. That is the bond.

Mr. ANDROS:

Q. Have you the bond that Hellman, Haas & Co. gave?

A. That is the bond which they gave (referring to the paper marked "Claimant's Exhibit No. 5").

Q. Is that signed by Hellman, Haas & Co.?

A. Yes, sir, that is signed by Hellman, Haas & Co.

231 Q. Did they give any other bond, except this?

A. No, sir.

Q. You are sure of that?
A. To the best of my knowledge that is true.
Q. Did they address you any correspondence in respect to this bond?
A. I have no correspondence on the file in regard to it.

Mr. TOWLE:

Q. By reference to this paper, are you able to fix the date at which that bond was given?
A. The bond is dated May 10, 1888.
Q. So far as you know, that is the date at which it was given?
A. So far as I know, that is the date at which it was handed in to my office.

The COURT: Do you offer that bond in evidence, Mr. Towle?
Mr. TOWLE: I do not care anything about it, except the fact that the bond is given, and that the date is stated to be May 10, 1888.

Q. Did the Bancroft-Whitney Company also give a bond?
A. They did.
Q. Are you able to state the date at which the Bancroft-Whitney Company executed their bond?
A. The only knowledge I have is the date in the bond.
Q. Will you look at this paper which I now mark "Claimant's Exhibit 6," and state whether or not that is the bond which the Bancroft-Whitney Company gave?
A. (After examination.) That is the bond they gave.
Q. From that paper can you state the date the bond was given?
232 A. I cannot.
Q. Can you state about the date?
A. No sir; it was between the 10th and 15th of May.

Mr. ANDROS: If your honor please, all the objections that were made to the other bond apply to this, it is understood.
The COURT: Yes. Objections overruled.
Mr. ANDROS: We note an exception.

Mr. TOWLE:

Q. You say it was signed between the 10th and 15th of May?
A. Yes, sir; between the 10th and 15th of May, 1888.

Cross-examination.

Mr. ANDROS:

Q. Mr. Hooper, everybody who had goods on board of that ship when she arrived here after the accident had to give a bond, and did give a bond, in order to get them, so far as you know?
A. They had to give a bond in order to get them, yes, sir.
Q. Do you know whether or not all the bonds that were given were exactly like the ones to which you have testified? I speak now as to the printed matter.
A. I cannot say in regard to that.

Mr. TOWLE: If your honor please, we now offer in evidence the return made by the marshal as to the service of the first monition issued in this case.

Mr. ANDROS: For what purpose do you offer it?

Mr. TOWLE: This monition bears date the 28th day of
233 April, 1892. It is entitled in this proceeding, signed by Southard Hoffman, clerk, the return upon which by the marshal, reads as follows——

Mr. ANDROS: Wait a moment, please. For what purpose do you put that return in evidence? It may be competent for one purpose and not for another.

Mr. TOWLE: I put it in for the purpose of showing that the day this monition was received by the marshal the vessel was not in the district.

Mr. ANDROS: How does that appear on the monition?

Mr. TOWLE: It gives the return.

Mr. ANDROS: You mean the date of the return?

Mr. TOWLE: I offer it as testimony. The return is evidence going to show that the vessel was not in the district at the time this proceeding was commenced.

The COURT: Is there any objection?

Mr. ANDROS: If it shows that, it is competent. The question is, whether it does. I have no objection to its going in provisionally, to see what it is.

Mr. TOWLE: The marshal's return upon this monition reads as follows: "After due and diligent search, I was unable to find the steamer 'Queen of the Pacific,' otherwise called the 'Queen,' in my district, and return this monition unexecuted. W. G. Long, U. S. marshal, by A. L. Farish, deputy marshal. Dated May 3, 1892."

Mr. ANDROS: That is the date he made on that return. It was filed May 3, 1892, by the clerk—the endorsement on it shows that.

Mr. TOWLE: If the court please, I had relied upon the witness Mr. Bulger being here this morning to testify in this case.
234 He will be the only other witness which I desire to call at this stage of the proceedings. I am informed now that he went to Santa Rosa this morning, and will not be back until this afternoon. If Mr. Andros has any testimony to offer in rebuttal, I am satisfied that he should now proceed. Mr. Bulger's testimony simply goes to the question of seaworthiness.

Mr. ANDROS: I think you had better finish your case before I proceed.

Mr. TOWLE: Mr. Bulger was the superintendent of construction of the vessel.

The COURT: Will Mr. Bulger be here tomorrow?

Mr. TOWLE: The information that I have is that he will be back this afternoon.

The COURT: We will proceed tomorrow, then.

Mr. ANDROS: I would like to inquire when Captain Alexander will be here again, as I desire to ask him a few more questions.

Mr. TOWLE: He will be back on the 4th of June.

Mr. ANDROS: I ask counsel to have him present upon that date, then, so that I may examine him further.

(The court here took an adjournment.)

Testimony. Filed June 10th, 1896.

FRIDAY, *June* 5, 1896.

MARTIN BULGER, called for the respondents, sworn.

Mr. TOWLE:

Q. What is your profession?
A. Engineer.
Q. What character of engineer—mechanical engineer?
A. Yes, sir.
Q. How long has that been your profession?
235 A. All my life, pretty much, since I have been a young man. I served my time to it.
Q. And about how many years would that be?
A. About forty.
Q. As mechanical engineer, did you become conversant with iron steam vessels?
A. I have had some experience, yes, sir.
Q. During how many years did you have experience with iron steam vessels?
A. About ten or fifteen years.
Q. Were you at any time the superintendent of construction of iron steam vessels?
A. Yes, sir.
Q. At what time?
A. In 1875 I went East for the Alaska Company and superintended the construction of the "St. Paul."
Q. Where was she built?
A. At Cramps', on the Delaware.
Q. Was there any other vessel you superintended the construction of?
A. At the Cramps'?
Q. Any.
A. Any other vessel?
Q. Yes.
A. A number on the coast here, but they were wooden vessels.
Q. I speak of iron vessels.
A. I superintended the building of the "Queen."
Q. The "Queen of the Pacific"?
A. Yes, sir.
Q. Do you remember the year that you did that?
A. I do not remember the year. I cannot place the date. The records will show the date.
236 Q. You remember the circumstances?
A. Yes, sir.
Q. What was the character of your supervision of her construction? What did you do or superintend in connection with it?

A. I had the supervision of the entire vessel, from the keel to the truck.

Q. Was that for the purpose of seeing that she was built according to specifications?

A. Yes, sir; the same as all men are supposed to superintend a vessel; it is to see that the vessel is first class in every respect to the specifications and drawings; to see that the work is properly done.

Q. Were you familiar with the specifications for that vessel prior to the time that you assumed the superintendency of her construction?

A. Yes, sir.

Q. As a mechanical engineer, in your judgment were those specifications such as that they provided for a thoroughly competent and seaworthy vessel of the class of the "Queen"?

A. Yes, sir.

Q. You say that the specifications for the "Queen" were such as would, if followed, provide for a thoroughly seaworthy vessel of her class?

A. Yes, sir.

Q. In her construction were the specifications adhered to?

A. Yes, sir.

Q. And what was the character of the "Queen" as to sea-
237 worthiness at the time that she was turned over by the Cramps to those for whom you had superintended her construction?

A. She was a first-class vessel in every respect. I do not suppose, in my judgment, there was a finer ship launched at the Cramps' yard.

Q. And what was it which rendered her more than a usually good vessel of her class, in your judgment? What is the basis of that opinion?

A. The money paid for a first-class vessel; that is what gives you a first-class vessel, by paying a first-class price for it.

Q. That is one element. Your judgment is that the ship was in herself an unusually good vessel?

A. Yes, sir.

Q. Why do you so regard her?

A. In the construction of a first-class vessel it is the material and the weight of the material and the amount of strength you put in the vessel which makes her a first-class vessel. If that is what the young gentleman is asking me, that is my answer.

Q. Take the frames of the "Queen of the Pacific," were they heavier or lighter than in other ordinary vessels of her class—her tonnage?

A. It depends on the tonnage of a vessel and the size of the frames. The tonnage of a vessel calls for a certain sized frame, the length and beam of the vessel. A small vessel is lighter. I could not answer that question.

Q. I speak with reference to the tonnage of the "Queen." What was the character of her frames, as being heavier or lighter than usual for a vessel of her tonnage?

238 A. All through the construction of the "Queen" she was heavier in all particulars than the Bureau Veritas called for. She was built under the construction of the Bureau Veritas.

Q. And her frame was heavier, I understand?

A. Yes, sir.

Q. Her plating was heavier?

A. Yes, sir, and the vessel in every particular.

Q. In your judgment how long should a vessel of the character of the "Queen" remain a seaworthy vessel?

A. It depends a great deal on the care you take of the vessel. A vessel of that construction ought to last twenty-five years, provided she was properly cared for by painting her inside, and no corrosion taking place. She ought to be good for twenty-five years at the least.

Cross-examination.

Mr. ANDROS:

Q. This vessel was built by the Cramps?

A. Yes, sir.

Q. Where was their yard?

A. On the Delaware river, at a place called Richmond.

Q. When you superintended the building of her, were you there?

A. I was there all the time, yes, sir—that is, in working hours.

239 Redirect examination.

Mr. TOWLE:

Q. Did you bring her out to this coast?

A. I came out as chief engineer. Captain Alexander was the captain of the ship.

Q. You came as chief engineer of that vessel?

A. Yes, sir.

Mr. TOWLE: We rest.

E. ALEXANDER, recalled for the libelant, in rebuttal.

Mr. ANDROS:

Q. When you raised the steamer at Port Harford, in order to do that did you pump her out?

A. Yes, sir.

Q. Was it necessary, in order to pump her out and float her, to ascertain where the leak was? I don't ask you what it was.

A. I understand. Not necessarily so.

Q. Did you understand where it was?

Mr. TOWLE: Personally, yourself.

Mr. ANDROS: No.

Q. Did you know, as master of that ship, where it was?

A. No, sir, I did not know where it was.

Q. Did you send down a diver?

A. Yes, sir.

Q. How many times did the diver go down?

A. I think some three or four times—five, maybe. I don't remember exactly. That I could not say.

Q. When he went down the first time, for what purpose did he go?

240 A. He went to see if he could find anything wrong with the ship or a hole in her. The condition of her bottom as far as he could see.

Q. Did he go down at any time for the purpose of stopping any leak that he might have found?

A. I think he did, yes, sir.

Q. So far as you know, did he stop it?

A. As far as I know, he did.

Q. After he had gone down for the purpose of stopping the leak, and returned, did you then commence pumping her out for the purpose of floating her?

A. After all the bulkhead doors were secured from the inside we built a cofferdam around the forward hatch, and we pumped her out.

Q. You had to build a cofferdam around her in order to free her from the water?

A. Yes, sir.

Q. When she was pumped out, she would float, of course.

A. Yes, sir.

Q. How long after she was floated was it before she started to come to San Francisco?

A. I think we were here in about forty-eight hours after she was floated. I think about forty-eight.

Q. Did she leak coming up, to your knowledge?

A. She made no water to my knowledge.

Q. Was Captain Charles Goodall there during the time she was being freed from water?

A. Yes, sir.

Q. How long after she sunk was it before Captain Charles

241 Goodall came down to the scene of the disaster, if you recollect, or about how long?

A. I think he arrived in about twenty-four hours. I could not say positively. My impression is that he arrived the next day. That is my impresion. I think it was the next day he arrived. He came down on the "Santa Rosa," I know.

Q. Was he there at the time when the diver went down for the purpose of examining the bottom and sides of the ship?

A. I think he was, yes, sir.

Q. You testified the other day that an attempt was made to discover where the leak was by looking along the outside of the ship?

A. Yes, sir.

Q. Was that done by sending a man down in a bow line—I think you so testified.

A. Yes, sir.

Q. Did he go below the stringer of which you have spoken?

A. No, sir.

Q. Whereabouts is that stringer located with reference to the dead lights of the ship—above them?
A. Just above the dead lights. The dead light is close up under the guard. It may be six or eight inches—something like that, but not far from that.

Cross-examination.

Mr. TOWLE:

Q. When you speak of Captain Charles Goodall you mean Captain Minor Goodall?
A. Captain Charles Minor Goodall.

242 Mr. ANDROS:

Q. He is a relative of Charles Goodall, Senior?
A. His son.

A. O. FARRISH, called for the libelant in rebuttal, sworn.

Mr. ANDROS:

Q. You are one of the deputies of the marshal of the United States, of this district, are you?
A. Yes, sir.
Q. Were you one of the deputies of the then marshal of this district in 1892?
A. Yes, sir.
Q. During the whole of the year 1892?
A. Yes, sir.
Q. On the monition issued in the case No. 10301, entitled Bancroft, Whitney & Co. and others against The Steamship "Queen of the Pacific," is this return: "After due and diligent search I was unable to find the steamship 'Queen of the Pacific,' otherwise called the 'Queen,' in my district, and returned this monition unexecuted." Whose handwriting is that in?
A. That is in mine.
Q. You made that return, did you?
A. Yes, sir.
Q. That return is dated May 3, 1892, is it not?
A. Yes, sir.

243 Q. What does that May 3rd relate to? To the time that that search was made, or when you returned you could not find the vessel, or to the date when you sent the monition back to the clerk's office for filing?
A. That refers to the day that we sent the monition back to the clerk's office.
Q. It does not fix the time when you made that search where you returned that you could not find the vessel?
A. No, sir.
Q. Have you any recollection as to when this monition was lodged in the marshal's office for execution?
A. I guess it must have been lodged about the time it was issued.

I looked back at the books, and they show it was lodged on the 29th—at least, it was entered. I could not swear whether that is the very day we got it.

Q. They are not always entered the same day you receive them?

A. We try to enter them the same day. Sometimes we are in a hurry to execute the process, and the deputy takes it right off, and it is not entered until the next day. Generally, we try to make a note when anything of that kind happens. At that time it may have been that it was not entered. As a general thing, it is entered the very day the monition comes in.

Q. I understand you, where there is a necessity for haste to make the seizure, the deputy is immediately dispatched, and it may not get in until the next day?

A. Yes, sir.

Q. The date of the entry on your book would not be conclusive as to when it was firet handed into the marshal's office?

A. Not always.

244 Cross-examination.

Mr. TOWLE:

Q. Would the fact that this monition is endorsed as issued April 28, 1892, and that you have no entry of it in your books until the 29th, indicate to you that this monition was placed in the hands of some one for service immediately it was received?

A. No, sir; not necessarily, but I think if the entry from the clerk's office should show it was delivered to the marshal on the 28th, then it would.

Q. I thought you said that in the ordinary course it would be delivered to you upon the day it was issued?

A. Yes, sir; ordinarily. They are generally very prompt in delivering papers immediately on the very day.

Q. If as a matter of fact there was haste; that it was desired there should be expedition in making service on the monition, if you assume that to be the case, then would the fact that your entry of it was dated the day subsequent to the day it was issued, indicate that your office had done all it could to secure the prompt service of the monition?

A. How do you mean; that I would judge that from the fact of the entries?

Q. If we assume that there was a desire for haste, that it should be served immediately it was issued, then would the fact that you did not make an entry of it until the day following the day of its issue, indicate to you that your office had used all the expedition possible in making the service?

A. It would point to that conclusion in my mind.

245 Q. That is, that you had not held it long enough to make a note of it?

A. Yes, sir. If it was issued from the clerk's office, and delivered to the marshal upon that day, then the fact that we had not en-

tered it upon that day would be a point in my mind concluding that we had rushed a man right off to make the service.

Q. That would be the ordinary course in your office if there was a hurry in the matter, you would place the monition in the hands of a deputy, and start him off as speedily as possible?

A. Yes, sir.

Q. Waiting until the return of the monition to make the entry in your book?

A. That used to be the way. Now we have a young lady who copies it in shorthand, and I generally tell her to make a note of it right away.

Q. What was the case in April, 1892?

A. I think it was in the way you speak, that we would rush it off immediately. Sometimes even now, where there is excessive haste, if there is no one convenient to make a note on a piece of paper, we rush it right off, because haste is what we want.

Mr. ANDROS: We rest.

FRANK MALLOW, called for the respondents, in surrebuttal, sworn.

Mr. TOWLE:

Q. Have you sometimes been called Frank S. Esmelts?

A. Yes, sir.

246 Q. You sometimes go by that name?

A. Yes, sir, sometimes.

Q. What nationality are you?

A. Portuguese.

Q. What is your age?

A. About thirty-eight or thirty-nine.

Q. What is your occupation?

A. Seaman.

Q. How long have you been a seaman?

A. I have been at sea since I was nineteen years old.

Q. You have been going to sea ever since?

A. Yes, sir.

Q. How long have you been on this coast?

A. Upon this coast about eleven or twelve years.

Q. And in that time have you been going to sea upon steam vessels?

A. Yes, sir.

Q. During what part of that time?

A. I was back east on some steamer.

Q. Have you been going to sea in steam vessels all the time upon this coast?

A. Yes, sir.

Q. All the time in steam vessels?

A. Yes, sir.

Q. Do you know the steamer "Queen of the Pacific"?

A. Yes, sir.

Q. Do you remember the time of the occurrence when she sank, or went on the beach at Port Harford?

A. Yes, sir.

Q. You remember that?

A. Yes, sir.

Q. Were you on her at that time?

A. Yes, sir.

247 Q. How long had you been on her before that time?

A. About fifteen months.

Q. What position did you hold upon the "Queen" on that trip?

A. I was captain of the after hold.

Q. What were the duties of the captain of the after hold?

A. To look after freight, clean up the hold, and clean the dead-lights, and close them.

Q. Did you attend to that duty?

A. Yes, sir.

Q. Did you see that the dead-lights were all properly closed upon that trip before she sailed from San Francisco?

Mr. ANDROS: I do not see what that has to do with this case. I do not see what it is rebutting.

Mr. TOWLE: Except this: That it appears now for the first time, from your examination, that there was a dead-light in this ship. I propose to show that if that was so, it was closed.

Mr. ANDROS: I was simply locating the place of the stringer so as to see whether they could examine the side of the ship below it. I do not see that this rebuts anything. I have not said anything about a dead-light, except I asked about the locality of the stringer, which was spoken of in evidence the other day. Captain Alexander testified they sent a man down with a bow line to examine the sides of the ship. I wanted to locate the position of the stringer piece to see whether he could go down below the stringer, and to see

248 whether he did. I have not said anything about dead-lights except to locate this stringer.

The COURT: It is a matter in the discretion of the court. I overrule the objection.

A. Yes, sir; I closed the dead-lights. I never go back and look at them, because I closed them.

Mr. TOWLE:

Q. Did you close them before the freight was put into her?

A. Yes, sir.

Q. And right at the time that the freight was being stowed in her?

A. Yes, sir; before the freight was stowed.

Q. Did you do that in the starboard alleyway?

A. Yes, sir.

Mr. ANDROS: Do not lead the witness.

Mr. TOWLE: If I did lead the witness it was unintentional.

Cross-examination.

Mr. ANDROS:

Q. You say you closed these dead-lights. When you closed the dead-lights, how were they fastened? Take the glass first. How was it fastened?

A. With some kind of a screw on the side of the ship. Afterwards I closed the back.

Q. There is a screw that goes into the rim of the glass light and goes into the side of the ship?

A. Yes, sir.

Q. How did you put that in?

A. On the side of the ship with the screws on.

249 Q. How did you put it in, with your finger, or a wrench?

A. With a wrench; a key.

Q. How was the iron back fastened, fastened with a screw?

A. It is fastened on the side of the ship, and screwed afterwards, screwed up.

Q. That is done with a wrench?

A. Yes, sir.

Q. Is it necessary, in order to open that light, to have a wrench to do it with, or can you do it with your finger?

A. I suppose I have to take a key.

Q. Do you know where that key was kept when it was not in use?

A. It was kept right on the stanchion, hanging up.

Q. In this compartment?

A. Outside.

Q. In one of the compartments of the ship?

A. Outside, in the after part.

Q. It was in the between-decks, where the cargo was?

A. Yes, sir; in the between-decks.

Q. How is the door which goes into this compartment fastened?

A. Fastened with some kind of screws outside.

Q. That is done with a wrench. That screw which fastens the bulkhead door which goes into this compartment, is fastened also with a key?

A. Yes, sir; or a wrench. The dead-light you always fasten with a key. The door is fastened with a wrench.

Q. When you speak of a key, you mean a small key?

A. Yes, sir; about as long as that (illustrating).

250 Q. How long is the wrench?

A. The wrench is about as big as that.

Q. The screw which fastens the bulkhead door is much longer than those which fasten the dead-lights?

A. Yes, sir.

Q. Where is that wrench kept when it is not in use?

A. Alongside of the port.

Q. Outside?

A. Yes, sir.

Q. When the dead-lights are all closed, and the doors are fastened, is it light or dark in that alleyway?

A. It was dark at the time I closed the doors.

Q. When the doors are closed it was very dark?

A. Yes, sir.

Q. Where was the cargo? How high was it packed in this alleyway, clear up to the beam?

A. Not very high. Inside it was stowed high. Where we closed the doors, not quite so high.

Q. Near the bulkhead door it was not packed quite so high as it was further in?

A. No, sir.

Q. How high were these dead-lights from the deck?

A. About three or four feet.

Q. What is the height in the alleyway from the deck up to the beams?

A. About three or four feet; something like that.

Q. Is not that alleyway more than four feet high from the deck up to the beams?

A. Yes, sir; about seven or eight feet.

Q. That is what I am asking you, how far it was from the deck up to the beams.

A. About eight or nine feet.

251 Q. And these lights were about three feet from the deck?

A. Yes, sir.

A. JOHANSEN, called for the respondents, in surrebuttal, sworn.

Mr. TOWLE:

Q. What is your occupation?

A. Carpenter.

Q. Ship's carpenter?

A. Yes, sir.

Q. How long have you been following that pursuit?

A. About twelve or fifteen years, I should guess.

Q. Do you know the steamer "Queen of the Pacific"?

A. Yes, sir

Q. Do you remember the occasion of her misfortune at Port Harford?

A. Yes, sir.

Q. Were you connected with the vessel at that time?

A. Yes, sir.

Q. In what capacity?

A. Carpenter.

Q. As carpenter, had you any duties to perform upon the voyage?

A. Yes, sir, to go down below and see everything is all right at eight o'clock at night.

Q. When you say "down below," what do you mean? To what part of the vessel do you go?

A. Down between-decks, and all around; sound the pumps.

Q. For what purpose is that examination made?
A. So that everything is all right. To see that everything is safe.
Q. Safe against what?
A. No water in her, and everything is all right.
252 Q. A tour of inspection to see that everything is all safe?
A. Yes, sir.
Q. Did you make that inspection at eight o'clock, or at any time after you left San Francisco upon that trip, and before you reached Port Harford?
A. Yes, sir.
Q. At what time did you make that examination?
A. At eight o'clock, night. Do you mean before we came to Port Harford?
Q. Yes. I mean after leaving port, at what time did you make it?
A. Eight o'clock.
Q. What part of the ship did you visit?
A. Fore and aft.
Q. Did you go into the after between-decks?
A. Yes, sir.
Q. What, if anything, did you find there?
A. Nothing, except everything was all right.
Q. Was there any indication of water in the after between-decks at eight o'clock that night?
A. No, sir.
Q. Was there any indication of an unusual quantity of water in the ship at any point that you discovered in that ship at that time?
A. No, sir.

Mr. ANDROS: Do not lead the witness so much. Ask him what he discovered.

Mr. TOWLE:

Q. Did you afterwards see any unusual quantity of water in the ship?

Mr. ANDROS: Objected to as leading.

A. What do you mean?

The COURT: You can frame that question without the criticism that it is leading.

253 Mr. TOWLE:

Q. Did you afterwards discover water in the ship?
A. Not before I got called.
Q. At what time did you see water in the ship that night?
A. I thought it was half past one, but they say——
Q. No matter what they say. Give us your time.
A. I do not know. I did not look at the time. I got called and I rushed out. I did not look at no time, or anything else.

Q. You were called?
A. I was called.
Q. What part of the ship did you first go to?
A. They told me there was water in the after hold, and I went down there.
Q. What did you find?
A. I found water in the starboard, close to the port.
Q. What examination, if any, did you make, or did you make any examination to see from what point the water came?
A. Yes, sir, I was all around the after port there, and looked all around there, and could not find any, so I went forward and found it in the starboard alleyway, coming aft.

Cross-examination.

Mr. ANDROS:

Q. What time did you sound the pumps—eight o'clock at night?
A. Eight o'clock, sir.
Q. Then you went below and looked around?
A. Yes, sir.
Q. Did you open the alleyway doors, the bulkhead doors?
A. No, sir.
254 Q. That is the alleyway where the cargo is stowed. Those doors were closed with a screw?
A. Yes, sir.
Q. But you went around those parts of the ship, fore and aft, where you could walk around to see whether everything appeared to be all right?
A. Yes, sir.
Q. You did not open those doors?
A. No, sir.
Q. How soon after you were called, of which you have spoken, was it that you sounded the pumps—immediately?
A. I did not sound the pumps. They told me there was water in the after hold, and I went down there.
Q. You did not sound the pumps at all?
A. No, sir.
Q. You do not recollect about what time in the night or morning it was?
A. I do not, not exactly. It was somewhere around one or two o'clock, or three; something like that.
Q. After you left Port Harford to come back to San Francisco, did you sound the pumps as usual in the evening?
A. Yes, sir.
Q. Was she making any water then?
A. No, sir.

Mr. TOWLE: We rest.
Mr. ANDROS: We rest.

Testimony closed.

(Endorsed:) Filed June 10th, 1896. Southard Hoffman, clerk.

255 CLAIMANT'S EXHIBIT No. 4.

Office of Johnson & Higgins, 315 California St.

SAN FRANCISCO, *May* 2, 1888.

DEAR SIR: The st'm'r "Queen of the Pacific" while on her late voyage from San Francisco to San Diego and way ports, sprung a leak and was beached in the bay of San Luis. She had on board consigned to you as below. To facilitate the delivery and obtain possession of these goods it will be necessary for you to appoint some one in this city to sign the bond for you and make a deposit on account of general average of 15 per cent. of the invoice value of the goods.

Please advise us in what company the goods were insured.

Yours truly, JOHNSON & HIGGINS.

H.

5 bx. salt.
1 s'k cloth.
1 bbl. wine.
5 bx. paste.
1 pkg. corks.

C. Giacconazzi.

(Endorsed:) No. 454. U. S. circuit court of appeals for the ninth circuit. Pacific Coast Steamship Co. *v.* Bancroft-Whitney Company. Claimant's Ex. No. 4. Received June 13th, 1898. F. D. Monckton, clerk, by Meredith Sawyer, deputy clerk.

256 (Endorsed:) No. 10301. Bancroft-Whitney Co. *v.* The Queen. Claimant's Exhibit No. 4. Hooper. June 1st, '96. J. S. Manley, deputy clerk.

CLAIMANT'S EXHIBIT No. 5.

Average Bond.

Whereas, the steamer Queen of the Pacific, whereof Alexander is master, having on board a cargo of merchandise, sailed from the port of San Francisco during the month of April (29th) last, bound for San Diego, Cal., and way ports, and in the due prosecution of her said voyage, leaked and was beached at Pt. Harford, bay of San Luis, California, by which means certain losses and expenses have been incurred, and other expenses hereafter may be incurred, in consequence thereof, which (according to the usage of this port) may constitute a general average, to be apportioned on the said vessel, her earnings as freight, and the cargo on board said vessel, and other charges thus incurred, may apply to and be due from specific interests. Now we, the subscribers, owners, shippers, consignees, agents or attorneys of certain consignees of said vessel or cargo do hereby for ourselves, our executors and administrators, severally and respectively, but not jointly, or one for the other,

covenant and agree to and with Pacific Coast Steamship Co. that the loss and damage aforesaid, and other incidental expenses
257 thereon, as shall be made to appear to be due from us, the subscribers to these presents, either as owners, shippers, consignees, agents, or attorneys of certain consignees of said vessel or cargo, shall be paid by us, respectively, according to our parts or shares in said vessel, her earnings as freight, and her said cargo, as shall belong or be consigned to us, or shall belong, or be consigned to any person or persons with whom we are copartners, agents or attorneys, or in any manner concerned therein, provided such losses and expenses aforementioned be stated and apportioned by Johnson & Higgins, average adjusters, in accordance with the established usage and laws in similar cases.

And we do further bind ourselves to furnish promptly, on request of said adjusters, all such information, invoices, and documents as they may require from us to make said adjustment.

And for the true performance of all and singular in the premises, we do severally hereby bind ourselves, our respective heirs, executors and administrators, to the said Pacific Coast Steamship Co. in the penal sum of ten thousand ($10,000) dollars, lawful money of the United States.

In witness whereof, we have to these presents set our hands, in the city of San Francisco, this 10th day of May, in the year of our Lord one thousand eight hundred and eighty-eight.

HELLMAN, HAAS & CO.

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Consignees.	No. of packages and description.	Amount of invoice.	Where insu. d.
	50 cs. asparagus.		
	250 kegs nails.		
	400 sack- rice.		
	20 mats tea.		
	3 bbl-. currants.		
	420 mats rice.		
	250 bbls. sugar.		
	100 hf. bbls. sugar.		
	10 cs. Lucca oil.		
	25 cs. pickles.		
	10 cs. chow-chow.		
	13 cs. drugs.		
	1 cs. cigarettes.	10,405 13	

It is hereby stipulated that the libelant Bancroft-Whitney Company signed a general-average bond for the merchandise specified in their libel, the terms and conditions of which are in all respects the same as the foregoing, which bond is signed not earlier than the 10th and not later than the 15th day of May, 1888.

MILTON ANDROS,
Proctor for Libelant.
GEO. W. TOWLE, JR.,
Proctor for Claimant.

(Endorsed:) Average bond of the "Queen of the Pacific." Hellman, Haas & Co. No. 10301. Bancroft-Whitney Co. *v.* The Queen. Claimant's Exhibit No. 5. Hooper. Filed June 1, '96. J. S. Manley, deputy clerk.

(Endorsed:) No. 454. U. S. circuit court of appeals for the ninth circuit. Pacific Coast Steamship Co. *v.* Bancroft-Whitney Company. Claimant's Ex. No. 5. Received June 13th, 1898. F. D. Monckton, clerk, by Meredith Sawyer, deputy clerk.

259 (Style of Court and Title of Cause.)

Opinion.

Libel *in rem* by various shippers of goods shipped on board the steamer "Queen," for breach of contract for damages to said goods by sea water, alleged to have been caused by the negligence of the master, officers, and crew of the steamer, while said goods were being transported from the port of San Francisco to the port of San Diego, State of California. The case involved 37 claims. Decree for libelants.

Messrs. Andros & Frank, proctors for libelants.

Geo. W. Towle, Jr., Esq., proctor for claimant.

MORROW, *District Judge:*

The action is for a breach of contract on the part of the carrier, and includes some 37 claims made by various shippers of goods shipped on board the steamer "Queen," for damages by sea water, alleged to have been caused by the negligence of the master, officers, and crew of the steamer, while said goods were being transported from the port of San Francisco to the port of San Diego, State of California. Testimony was introduced with respect to but two of the shipments, viz.: That of the Bancroft-Whitney Company and that of Hellman, Haas & Co. It was intimated at the hearing that these two claims would present all the questions arising on the several claims, and that after a final decision has been reached
260 with respect to them, the others would be a matter of subsequent arrangement.

The question of laches, which was raised when the exceptions to the libel were argued, was again urged at the final hearing. While the court, at the argument of the exceptions, strongly intimated that it would deny this ground of exception, still the question was left open, subject to the introduction of evidence as to whether or not the libelants had been guilty of laches in failing to bring their suit within four years from the date of the contracts of affreightment. That portion of the opinion, rendered in ruling on the exceptions to the libel, so far as it is material to the present inquiry, is as follows: "In other words, the deduction from the authorities is that, while there is no such thing as a statute of limitation in the admiralty law, yet courts of admiralty, in the furtherance of justice, will act by analogy, and refuse to entertain any suit where the party seeking to enforce his claim or lien has been guilty of laches. It is in fact

the equitable doctrine of laches, depending upon the circumstances of the case. What would be laches in one case might not constitute such in another. The question is one addressed to the sound discretion of the court, depending upon all the facts of the particular case. It is, therefore, a question of evidence to be determined hereafter upon the facts as they may appear." (The Queen of the Pacific, 61 Fed Rep., 213, 216.) Counsel for claimant refers to several provisions of the Code of Civil Procedure of the State of California, which provide different periods of limitation within which suit can be brought Among these
261 statutes of limitation, assuming that the court were justified in acting by analogy and setting up the equitable bar of laches, is section 337 of the Code of Civil Procedure, which provides a limitation of four years in which "an action upon any contract, obligation, or liability, founded upon an instrument in writing executed in this State," can be brought. As the contracts of affreightment, which are involved in the present libel, were all executed in this State, it follows that, if the court should determine that the libelants have been guilty of laches, the section referred to contains a rule applicable to this case. The libel was filed on the last day of the four years' limitation as to most of the contracts, although as to some of them it is one or two days behind the time. The claimant contends that this delay in bringing the libel constitutes laches. There is nothing in the case, however, outside of mere delay in bringing suit, which indicates that the libelants have been unduly negligent or unnecessarily slow in prosecuting their claim for damages. The most that can be said against them is, that they have availed themselves of the full statutory period allowed by the State provision before instituting their suit. But this, of itself, without some proof of any exceptional circumstances from which laches would be imputable, is not sufficient to justify a court of admiralty in declining to entertain a suit and refusing to pass upon its merits. As was said by Judge Lacombe, in Southard *et al. v.* Brady, 36 Fed. R., 560: "It is true that there is no statute of limitation in admiralty, but courts of admiralty, like those of equity, will not
262 lend their aid to enforce stale demands. Exceptional circumstances sometimes induce a court of admiralty to pronounce a claim stale after a lapse of time less than the local statutory period of limitation. Where there is nothing exceptional in the case, the court will govern itself by the analogies of the common-law limitations." Judge Brown, in Nesbit *et al. v.* The Amboy and the Transfer No. 2, 36 Fed. R., 925, after stating that the courts of admiralty will enforce the doctrine of laches as against procrastinating litigants, where it appears that third parties have acquired a *bona fide* lien or right in a vessel, continues thus: "But where no subsequent *bona fide* liens have arisen, there is no good reason why a suitor should not be permitted to proceed *in rem* in courts of admiralty, so long as he may sue *in personam*, or maintain a suit at law for the same debt." (Citing The Lillie Mills, 1 Spr., 307; The Bristol, 11 Fed. R., 162; Martino Cilento, 22 Fed. R., 859.) The circuit court of appeals for the second circuit, in the case of Bailey

et al. v. Sundberg, 49 Fed. R., 583, speaking through Judge Wallace, said, in passing upon a contention, as in the case at bar, that the libelants had been guilty of laches in delaying the commencement of the suit: "Inasmuch as the present action was commenced within six years from the time when the cause of action accrued, and there are no special circumstances to charge the cargo-owner with laches, we think there is no equitable bar to the suit upon the ground of delay. Where there is nothing exceptional in the case, courts of admiralty govern themselves by the analogies of common-law limitations." Further citation of authority is unnecessary;
263 it only remains to apply the rule therein enunciated to the case at bar. In the first place, it does not appear that the claimant, by this delay of four years, has been prejudiced in any of his rights, or that any defense which he could, or would, have presented has been impaired or jeopardized. It does not appear that claimant could, or would, have presented a stronger or better defense, had the action been commenced sooner. No pretense is made that, by reason of the delay, witnesses have died or gone away; or that testimony, once accessible and material to a defense of negligence, has been lost. In other words, there is no showing by claimant of any special or exceptional circumstances which would justify this court, as a court proceeding upon equitable principles, to hold that the libelants have been guilty of such laches as, in good conscience and equity, amounts to an equitable defense and bar to this libel. While it is true that the long delay of four years is unexplained, and the court is at a loss to understand why the libel was not sooner filed, still such laches as there may have been are, under the facts of this case, not sufficient to justify this court in dismissing the case without considering its merits. The contention of counsel for claimant in this respect is, therefore, overruled.

With respect to the limitation of one year contained in section 813 of the Code of Civil Procedure, as to suits to enforce the lien given by the State statute for injuries to goods shipped on board a vessel, what was said by this court in the opinion upon the exceptions to the libel (see opinion, 61 Fed. R., 213, 216, and
264 cases there cited), is applicable and pertinent at the present time. It is sufficient to say, as was there stated, that the libelants are not suing to enforce the lien which the State statute purports to give, but they are suing to enforce the lien given by the general maritime law. See, particularly, The Key City, 14 Wall., 653, 660; Henry on Adm., 185.

The libel sets forth that the goods, comprising these several shipments, were shipped in good order and condition, under the contracts contained in the shipping receipts; that the steamer sailed from the port of San Francisco with said goods on board, bound for the port of San Diego; that said goods were never delivered at the port of San Diego, but were returned to the port of San Francisco in a greatly damaged condition, having been wet with sea water during the voyage, which, it is alleged, gained access to the interior of the vessel where the goods were stowed, by reason of the negligence of the steamship company, its officers and servants. The

answer admits these facts; with the exception, however, that it denies specifically that said goods were so wet with sea water during said voyage through or by the negligence of the steamship company, its officers or servants. As a further and separate defense, the answer avers, substantially, that the said steamship, when she sailed from the port of San Francisco, was stout, staunch, strong and seaworthy in every respect; that she was completely manned, officered, and otherwise thoroughly equipped for her then intended voyage; that she left San Francisco on April 29, 1888, at about 2 o'clock p. m., and proceeded down the bay, out through the Golden Gate across the bar,
265 and on her course in a southerly direction, with a fresh northwest wind blowing and a northwest chop sea; that no unusual incident was known to occur during said 29th day of April; that about one o'clock a. m. of the next day, April 30th, said steamship was noticed to have a slight list to starboard; that efforts were then made to correct such list by shifting freight to port in the between-decks and burning coal mostly from the starboard bunkers; that about 2.15 or 2.30 o'clock a. m. of the same morning, water was discovered to be dropping from a point in the iron bulkhead on the starboard side of the engine-room, and about 6 or 8 inches above the deck of the alleyway in the between-decks of the vessel; the examination thereupon made resulted in the discovery of water in the between-decks of the steamship aft, such water extending about half way from the side of the ship to the hatch coamings, but the aperture through which such water entered the vessel could not, after diligent search for the same, be discovered; that seamen were put to work passing such water down the hatches into the hold so as to bring it within reach of the bilge pumps, and such pumps were kept in operation, notwithstanding which the water steadily increased between-decks and the list of the vessel became so great that about 5 o'clock a. m. it was deemed prudent by the master of the vessel to make for Port Harford with all convenient speed, which was done, and at about the hour of 7 o'clock a. m. the said vessel was run upon the beach at said Port Harford, at which place sea water immediately came in over her deck and nearly
266 filled the vessel with water, and thereby said merchandise became wet with sea water; that the beaching of said steamship was necessary to prevent, and avoid, a total loss of said steamship and of all the merchandise then on board of her, and was done by the master thereof as the result of cool deliberation and in the exercise of a wise discretion on his part as to what was best to be done, and with the purpose of saving said vessel and cargo and of rendering entirely safe the lives of all the passengers and crew, aggregating 212 persons, then on board the vessel. Under this state of the pleadings, the following facts appear to have been established: (1) That the libelant's merchandise was shipped under the contracts of affreightment or shipping receipts, as they are termed, annexed to the libel; (2) that such contracts or receipts provided, among other things, as follows: "The company shall not be held responsible for any damage or loss resulting from fire at sea or in

port, accidents to or from machinery, boilers, or steam, or any other accident, or danger of the seas, rivers, roadsteads, harbors, or of sail or steam navigation of what nature or kind soever." (3) That the merchandise was never delivered at the port of destination: (4) that it was returned to San Francisco and delivered to the shippers in a damaged condition; (5) that this damage arose from having been wet with sea water. Under the issues, as thus presented, the proctor for libelants contented himself with introducing the shipping receipts as evidence of the apparent good order and condition of the goods when delivered to the carrier for shipment. Some testimony, also, was introduced respecting the damaged state of the shipment of Hellman, Haas & Co.,
267 when it was returned to San Francisco, and that the goods, in their damaged state, realized less than they would have brought had they been returned in good order and condition. The libelants then rested their case. Thereupon claimant moved for a judgment in his favor, contending, among other things, that there was a presumption that the vessel was seaworthy when she set out on her voyage, and that the fact that the merchandise was damaged by sea water did not, in the absence of any affirmative proof by libelants of negligence on the part of the carrier, create a presumption of negligence against the latter, but rather gave rise to the presumption that such damage had been caused by a peril of the sea. After elaborate arguments, this court held that, under the state of facts disclosed by the pleadings and the proof introduced by the libelants, a *prima facie* case of negligence had been made out and that the burden of removing this presumption, by showing affirmatively that the damage had arisen through a peril of the sea or in some manner other than through the negligence of the carrier, devolved upon the claimant. The court pointed out that the admitted facts in the case were not sufficient to entitle the carrier to the presumption that his vessel was seaworthy at the inception of the voyage, but, on the contrary, they seemed to justify the presumption that the vessel was unseaworthy at that time, and the mere fact that the libelant's merchandise was wet and damaged by sea water, which gained access to the vessel, did not necessarily give rise to the presumption that it was occasioned by a peril of the sea. The motion for a judgment in favor of the claimant
268 was, therefore, denied. ("The Queen of the Pacific," 75 Fed. R., 74.) The claimant thereupon introduced evidence in support of the averments of the answer, tending to show: (1) That the steamship, when she sailed from the port of San Francisco, was absolutely seaworthy; (2) that she was manned by a competent master, officers and crew; (3) that the fact that the vessel was leaking was discovered about eleven hours after the steamer sailed from San Francisco; (4) that everything was done consistent with prudent navigation and good seamanship, to discover the aperture or place through which the water entered the vessel; (5) that the leak or quantity of water entering the vessel increased to such an extent that the vessel was compelled to put into Port Harford, with all convenient speed, and was there beached about seventeen hours

after sailing from San Francisco. It appears from the evidence that the leak was on the starboard side of the vessel. The presence of water was first noticed at about ten minutes past two o'clock of the morning of the 30th of April by a water tender, whose duty it was to look after the boilers, the ship's pumps and the bilges, and whose watch it then was. He discovered a small amount of water on the floor of the engine-room in a place that should have been dry. Upon investigation, it was found that water was coming through a small hole in the bulkhead over the engine-room, or, to be more specific, that it was dropping from a point in the iron bulkhead on the starboard side of the engine-room and about 3 or 4 inches above the deck of the alleyway in the between-decks of the vessel. The water was undoubtedly coming from what was termed a water-tight compartment on the star-
269 board side. The matter was reported to the captain and measures immediately taken to ascertain the locality and cause of the leak and to arrest its progress. Two donkey pumps and a centrifugal pump were set to work. A list to starboard had been noticed about an hour previously, but no particular significance was attached to this at the time, although steps were taken to correct it by shifting freight from starboard to port and burning coal mostly from the starboard bunkers. But soon after the leak was discovered the chief officer roported that there was a starboard list of from 6 to 7 degrees. The hatch was taken off to let the water descend into the ship's after lower hold, and the engineer tapped the lower hold in the alleyway, and also the shaft alley. All measures, however, to arrest the flow of water into the compartment and to correct the list of the vessel proved ineffectual and unavailing, for the list kept steadily increasing until the captain, as set forth in the answer and reaffirmed in his testimony, acting under cool deliberation and in the exercise of a wise discretion on his part as to what was best to be done, and with the purpose of saving the vessel and cargo and lives of all persons, passengers and crew, on board, ran the vessel upon the beach at Port Harford in about 22½ feet of water, at about 7 o'clock a. m., or about seven hours after the leak was first discovered. The evidence is silent as to the cause of the leak, and even the exact locality where the water gained access to the vessel is not disclosed by the evidence. Cap-
tain Alexander, the master, testified that the vessel was an
270 iron, screw steamer, brig rigged, built by Cramp & Sons, of Philadelphia, in 1882; that she was submitted to regular inspections once a year from the time she was built until the date of the accident on April 30, 1888; that she was rated by the board of inspectors, at the last examination, as A 1, and, from the knowledge which the witness had of iron steam vessels, he would rate her, as she was at the time she sailed from San Francisco just previous to the accident, as first class—the best that is given for iron steamships. Referring to the time when the leak was first discovered, the witness was asked:

"Q. Did you then endeavor to ascertain how the water entered the vessel?

"A. Yes, sir.

"Q. Were you able to find where it entered the vessel?

"A. No, sir. I knew very near where it came in the vessel, but I did not know how it came in. I knew it came in on the starboard side in a water-tight compartment."

On cross-examination the witness was asked:

"Q. Could you tell about how high above the between-decks the leak was?

"A. I could not tell. It was in a water-tight compartment, so I had no way of seeing or finding out." * * *

"Q. This water-tight compartment, was it lengthwise of the ship, or athwartship?

"A. No, sir, fore and aft, opposite the boiler and engine." * * *

"Q. What is the width of the bulkhead alleyway, inside?

"A. I don't know exactly, but I should say ten feet. It may
271 be more than that; it may be eleven. It might be nine or twelve. I should say about ten feet—the width of the alleyway across between-decks.

"Q. Was the reason why you could not discover where this leak was on account of the between-decks being filled with cargo?

"A. No, sir.

"Q. Why could you not find it, if the cargo did not obscure it?

"A. We tried to discover it from the outside and could not. There were men on the outside to see if they could discover anything upon the outside of the ship, and could not.

"Q. Why did you not try to discover it from the inside if the cargo did not prevent you?

"A. My instructions have been and were——

"Q. Never mind your instructions. Why did you not do it?

"A. Because the United States inspectors told me to close those doors and keep them closed and never open them. The United States inspectors of hulls and boilers.

"The COURT: At sea?

"A. At sea, in case of an accident.

"Q. No matter what danger the ship was in?

"A. No matter what danger the ship was in.

"Q. Did you understand by that instruction that you were not to take any proper precaution to ascertain whether there was a leak or not, and stop it?

"A. How did I know there might not have been a plate off the side of the ship or we had collided with something? To use good judgment, I considered it proper to keep those doors closed
272 in all compartments, when we find the ship making water, and I should do the same thing tomorrow."

On redirect examination, the witness was asked:

"Q. Did you ascertain where the water came from into the after between-decks, whether it came into the side of the vessel directly from that point or whether it came in out there from the alleyway, as you term it?

"A. It came from the alleyway.

"Q. As I understand you, you did not consider it prudent at that time to open either of the doors that closed the alleyway?

"A. I did not, sir." * * *

"Q. There are two doors to each alleyway?

"A. Yes, sir; on the forward end and the after end.

"Q. The same on both sides?

"A. Yes, sir; on the port and starboard side."

The captain further testified that there was a guard, also known as a stringer or fender, on the vessel. It was a piece of oak, 14 inches thick, upon the ship's side, put on between the deck frames, probably 10 inches down and about 14 inches out from the ship's side. It extended to within 20 or 30 feet of the bow and the same aft. The sea would wash over the guard, four or five times a minute. When the vessel was on an even keel in still water, the guard was a foot and a half above water, as the vessel was then loaded. This guard served for a fender and was used, also, for landings. Nothing was afterwards discovered which indicated that this guard had anything to do with the leak, and the captain was not aware that, at any time during the voyage, the ship collided with or struck anything, until she was beached at Port Har-
273 ford. Had anything serious of that character occurred, it would have been the duty of the officer of the deck, if he knew of it, to report it. No such report was, however, made. In closing the testimony of this witness, he testified as follows, in answer to questions propounded by counsel for libelants:

"Q. When you raised the steamer at Port Harford, in order to do that did you pump her out?

"A. Yes, sir.

"Q. Was it necessary, in order to pump her out and float her, to ascertain where the leak was? I don't ask you what it was.

"A. I understand. Not necessarily so.

"Q. Did you understand where it was?

"Mr. TOWLE: Personally, yourself?

"Mr. ANDROS: No.

"Q. Did you know, as master of that ship, where it was?

"A. No, sir; I did not know where it was.

"Q. Did you send down a diver?

"A. Yes, sir.

"Q. How many times did the diver go down?

"A. I think some three or four times—five, maybe. I don't remember exactly. That I could not say.

"Q. When he went down the first time, for what purpose did he go?

"A. He went to see if he could find anything wrong with the ship, or a hole in her. The condition of her bottom as far as he could see.

"Q. Did he go down at any time for the purpose of stopping any leak that he might have found?

274 "A. I think he did—yes, sir.

"Q. So far as you know, he did stop it?

"A. As far as I know, he did.

"Q. After he had gone down for the purpose of stopping the leak, and returned, did you then commence pumping her out for the purpose of floating her?

"A. After all the bulkhead doors were secured from the inside we built a cofferdam around the forward hatch, and we pumped her out.

"Q. You had to build a cofferdam around her in order to free her hold from the water?

"A. Yes, sir.

"Q. When she was pumped out she would float, of course?

"A. Yes, sir.

"Q. How long after she was floated was it before she started to come to San Francisco?

"A. I think we were here in about forty-eight hours after she was floated. I think about forty-eight.

"Q. Did she leak coming up, to your knowledge?

"A. She made no water to my knowledge. * * *

"Q. You testified the other day that an attempt was made to discover where the leak was by looking along the outside of the ship?

"A. Yes, sir.

"Q. Was that done by sending a man down in a bow line—I think you so testified.

"A. Yes, sir.

"Q. Did he go below the stringer of which you have spoken?

"A. No, sir.

"Q. Whereabouts is that stringer located with reference to the dead-lights of the ship—above them?

275 "A. Just above the dead-lights. The dead-light is close up under the guard. It may be six or eight inches—something like that, but not far from that."

Frank Mallow was called by the claimant, and testified that he was on the steamer on the voyage in question; that he was captain of the after hold; that his duty was to look after the freight, clean up the hold, clean the dead-lights and close them; that he performed that duty on this particular trip; that he saw that the dead-lights were all properly closed upon that trip before the steamer sailed from San Francisco. He also explained how the glass and iron backs of the dead-lights were fastened by means of a screw and this screw set in place by a wrench or key.

A. Johansen, the carpenter, testified that it was his duty to go below and see that everything was all right at eight o'clock at night. He made that inspection at 8 o'clock on the night after the vessel left San Francisco, visiting the vessel below fore and aft, including the after between-decks. Everything was all right—no indications of water in the after between-decks at 8 o'clock that night.

It does not appear, from the testimony, that the vessel, after she left the port of San Francisco, met with any known accident or injury which would have caused a leak. She does not appear to have

struck or come in contact with any rocks or other objects until she was beached at Port Harford, nor did she encounter such boisterous weather as would account for an opening in her side to which the leak could be attributed. It is true the captain testified that
276 after they sailed from San Francisco they had some boisterous weather—strong northwest winds—a heavy nor'wester, but he admitted, on cross-examination, that it was the ordinary weather met with and expected at that season of the year, and no pretense is made, either by him or his counsel, that the leak could be rationally attributed to any injury produced by the weather then prevailing.

From what has been stated of the pleadings and testimony, it appears that the case has been tried upon such narrow lines that but few facts of substantial value have been disclosed to enable the court to arrive at a satisfactory conclusion as to the real and efficient cause of the disaster. Indeed, it may be said that the case did not reach that stage of proof, where this particular question had been fully developed as an issue. As the case progressed, the important question always presented was, to determine the presumptions of law and fact, and on whom the burden of proof rested. The allegation of the libel is that the merchandise was returned to the port of San Francisco in a greatly damaged condition by reason of having been wet with sea water during the said voyage, which, through the negligence of said steamship company, its officers and servants, gained access to the interior of the said ship, where said merchandise was stowed. The burden of proving this allegation was upon the libelants, but it being established that the merchandise had been returned to the port of shipment in a greatly damaged condition by reason of having been wet with sea water, a legal presumption of negligence arose, which was attributed to the carrier because of this circumstance, and upon this presumption the libelants rested
277 their case. But this legal presumption of negligence now placed upon the carrier was based upon presumption of fact that the vessel, having become unfit to prosecute her voyage without being visibly exposed to any extraordinary perils or dangers of the sea, was in an unseaworthy condition when the voyage began. Work *v.* Leathers, 97 U. S., 379; Cort *v.* Delaware Ins. Co., 2 Wash. C. C. R., 375; Fed. Cas. No. 3257; Paddock *v.* The Franklin Ins. Co., 11 Pick., 227; The Planter, 2 Woods, 490; Fed. Cas. No. 11207*a*. This presumption of fact was met by proof from the claimant that the vessel, as before stated, was a well constructed, iron screw steamer, built in 1882; that she was admitted to regular inspections once a year from the time she was built until the date of the accident; that she was rated by the board of United States inspectors, at the last inspection, on June 21, 1887, as A1; that the hull of a vessel of the construction of the "Queen," properly repaired and cared for, would last from 50 to 60 years; that she was kept in proper repair, and, at the time she sailed from San Francisco just previous to the accident, she was rated by her master as first class—the best that is given for an iron steamship; that, upon the return of the vessel to San Francisco immediately after the accident, she

was examined by James Dickie, a competent ship-builder of long experience and the superintendent of the ship yard at the Union iron works, and, aside from the apparent effects of grounding, at Port Harford, he found her in a remarkably good condition and nothing to indicate unseaworthiness. The testimony relating to the guard or fender on the outside of the vessel incidentally
278 disclosed the fact that just below it were the dead-lights. The condition of these dead-lights then became a matter of some significance. Had one of them been negligently left open when the vessel sailed, the flow of the water through such an opening into the compartment might account for the leak, but the claimant introduced testimony tending to show that the dead-lights were all closed when the vessel sailed from San Francisco, removing the presumption of unseaworthiness that might attach to the unexplained condition of these openings at that time.

Here we reach the difficult point in this case. Upon whom now rests the burden of proof? Has the carrier removed the presumption of negligence cast upon it by the return of the merchandise in a damaged condition wet with sea water? Was it sufficient, to shift the burden of proof back upon the shipper, for the carrier to show that the vessel was in a seaworthy condition at the commencement of the voyage? In the case of the Edwin I. Morrison, 153 U. S., 199, the libelant sought to recover for damages to a cargo caused by the vessel taking in water through a hole in her side made by the breaking away of a cap from one of the bilge-pump holes. The defense was, that such breaking was caused by a danger of the sea within the exception in the charter-party and bill of lading. The vessel was on a voyage from Weymouth, Massachusetts, to Savannah, Georgia, with a cargo of guano. She encountered some rough weather and shipped large quantities of water, a portion of which found its way into the cargo through the bilge-pump hole. The circuit court found, as a fact, that before the
279 vessel sailed the cap and plate appeared to be in good order with no indication of looseness. The examination, which was at that time made of them, consisted of such inspection as could be given by the eye and to such an inspection they were from time to time subjected. The court said: "Perils of the sea were excepted by the charter-party, but the burden of the proof was on the respondents to show that the vessel was in good condition and suitable for the voyage at its inception, and the exception did not exonerate them from liability for loss or damage from one of those perils to which their negligence, or that of their servants, contributed. Liverpool Steam Co. *v.* Phenix Ins. Co., 129 U. S., 397, 438. It was for them to show affirmatively the safety of the cap and plate; and that they were carried away by extraordinary contingencies, not reasonably to have been anticipated. We do not understand from the findings that the severity of the weather encountered by the Morrison was anything more than was to be expected upon a voyage, such as this, down that coast and in the winter season, or that she was subjected to any greater danger than a vessel so heavily loaded, and with a hard cargo, might have an-

ticipated under the circumstances. The especial peril which seemed at one time to threaten her safety was directly attributable to the water taken on board through the uncovered bilge-pump hole." The circuit court had determined that as no one witnessed the removal of the bilge-pump hole plate, direct evidence of the cause of the mishap was not obtainable. It was to be inferred, however, from the facts proved, that it was knocked out by something striking violently against it. The Supreme Court, commenting upon this finding relating to this feature of the case, points out that they did not justify the conclusion reached by the circuit court and explains why they were insufficient, in the following language: "If, however, the vessel had been so inspected as to establish her seaworthiness when she entered upon her voyage, then upon the presumption that that seaworthiness continued the conclusion reached might follow, but we are of opinion that precisely here respondents failed in their case."

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In the present case, the claimant has introduced testimony tending to establish the seaworthy condition of the vessel when she set out on her voyage, and this testimony has not been contradicted. Now, if the only presumption of negligence, arising out of the damaged condition of the merchandise, was that the voyage had been commenced with a vessel in an unseaworthy condition, the court would be compelled to hold that the claimant had sufficiently answered the *prima facie* case made out by the libelants; but this does not appear to be the full scope of the presumption of negligence attributable to the carrier under this aspect of the case. Underlying the contract is the implied warranty, on the part of the carrier, to use due care and skill in navigating the vessel and in carrying goods, and it may be that through some carelessness or negligence on the part of the carrier during the voyage goods laden on board the vessel may suffer damage. This brings us to a consideration of the behavior of the vessel after she left port. The testimony does not directly indicate any negligence on the part of the officers or crew in navigating the vessel, but it does seem to point to an open dead-light as the cause of the leak in the watertight compartment. After the vessel had been beached at Port Harford and while she was partially under water, a diver was sent down to examine her bottom and ascertain what was wrong with the vessel. He went down several times and appears to have stopped the leak, for, after his final examination, all the bulkhead doors were secured from the inside, a cofferdam was built around the forward hatch, the water was pumped out and the vessel floated. Forty-eight hours afterwards she had returned to San Francisco without any leak occurring on the return voyage, and, upon being examined on the dry dock at the Union iron works in San Francisco, she was found to be in a thoroughly seaworthy condition, aside from the effects of grounding. It is difficult to understand how a leak of such a serious character as to make it necessary to beach the vessel a few hours after its discovery could have been stopped so easily and quickly, if it had not been caused by some such aperture in the side of the vessel as an open dead-light, which,

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being closed and properly fastened and the vessel freed from water, she was again restored to a seaworthy condition. But even if this supposition as to the cause of the leak is correct, it does not necessarily determine the ultimate question, whether the damage to the cargo from sea water was by reason of the negligence of the steamship company. The testimony is, that all the dead-lights of
282 the vessel were properly closed and fastened before the vessel sailed from San Francisco. It is true that this testimony may be disregarded if, under all the circumstances, it appears to be improbable. The witness who testified that the dead-lights were closed may have been mistaken, or one or more of the dead-lights may have been opened by some one after they had been closed and fastened by the person charged with this duty. Is the testimony improbable? The dead-lights were located about six or eight inches under the guard or fender. As the vessel was loaded on this particular voyage, this guard or fender was a foot or a foot and a half above the water line. This would leave the dead-lights from six to eight inches above the water, when the vessel was in still water and on an even keel. But when the vessel was in motion and at sea, the water washed above the guard, and, of course, much more above the dead-light. The captain testified that the sea would wash over the guard and away above it. He thought the sea would be above the guard four or five times a minute. If, then, a dead-light was open when the steamer set out on her voyage, the sea water must have commenced to flow through the opening very soon after she left her wharf, certainly when she reached the ocean outside the Heads. The vessel sailed at two o'clock on the afternoon of April 29, 1888. At eight o'clock on the evening of that day the carpenter made his tour of inspection below and found everything all right. There was no indication of water in the after between-decks at that time. It was not until ten minutes past two on the morning of April 30th, that the water-tender discovered about a half gallon of water spread
283 over a surface of three feet square on the floor of the engine-room. He searched for the source of the water and found that it had come through a small hole in the iron bulkhead of the starboard alleyway overhead. The hole was very near the bottom of the bulkhead and was about three-eighths of an inch in diameter. At the time the attention of the water-tender was attracted to the wet surface on the floor of the engine-room, no water was coming through this hole, but a few minutes afterwards, when she rolled heavily to port, the water came through again. The flow was at first intermittent, conforming to the roll of the vessel. The captain testifies that this hole in the iron bulkhead, through which the water came into the engine-room, was not three inches above the deck in the alleyway of the compartment on the starboard side. This compartment was about one hundred feet long by about ten feet wide and was stowed with cargo, probably of the miscellaneous character described in the libels. At one o'clock, the captain was out on deck, but there was nothing at that time to indicate that there was anything wrong with the vessel. The officer of the deck

reported that she had a little list to starboard, but there was nothing unusual in this condition, as the burning of coal from the port to the starboard side or *vice versa* would give the vessel a list from one side to the other. But within an hour of the discovery of water on the floor of the engine-room, the vessel took a permanent list to starboard, which she kept until she was beached. This testimony tends to show that the water had not been flowing very long
284 into the compartment when the leak was first discovered.

But if the water came in through an open dead-light, when was the dead-light opened and what opened it? The testimony tends to rebut the presumption that it could have been opened by any one after the vessel left port, but, on the other hand, if it had been broken open by the violence of some object coming into contact with it from the outside, there would have been some evidence of that fact in the condition of the dead-light after the accident, which the claimant could certainly have produced.

In the case of the Majestic, 20 U. S. App., 505, the vessel was on a voyage from Liverpool to New York. The baggage of the libelants was stowed in a compartment of the orlop deck. On arrival at New York, their trunks were found to be saturated with salt water and damaged. During the voyage the vessel encountered some rough seas and passed through a quantity of wreckage. Soon after it was found that the after porthole in the compartment, where the baggage was stowed, had been broken and that a large quantity of water had entered and damaged the baggage. There were three portholes on each side of the compartment, which were closed in the usual way with thick glass and an iron cover or dummy screwed up tightly. The glass was broken in many fragments and the iron dummy was forced from its hinges and turned back. The district court held that the finding of two or three feet of water in the orlop compartment, where the baggage was stowed, was so extraordinary an occurrence that the burden of proof was upon the ship to satisfy the court with a reasonable degree
285 of certainty that this occurred without her fault, and that the evidence in the case was not satisfactory on that point. The case was taken to the circuit court of appeals. That court held that: "The facts that the glass was splintered into many fragments, and that the iron dummy was forced from the hinges and thrown backward, show that the accident must have been caused by a violent blow coming from the ocean. It is reasonable to infer that it was caused by an apparent and adequate cause, rather than by one which rests entirely upon surmise, and we are, therefore, led to conclude that a blow from one of the floating planks inflicted the injury. * * * It was an unanticipated peril of the sea."

In the present case, the evidence furnishes no such explanation of the extraordinary occurrence, and the court is compelled to decide the case upon the weight of presumptions. In fact, as the proof now stands, although claimant contends that the damage by sea water to the goods must be attributed to some accident or danger of the sea, or of navigation, he has failed to show an accident, danger, or casualty of the sea, from which the leak can be reasonably, or at

all, inferred. Nor has he accounted for the leak at all, and so far as the evidence in the case is concerned the court is left in ignorance as to its cause. But can it be said that the carrier, against whom a *prima facie* case of negligence has been made out, discharges the affirmative duty of bringing himself within one of the exceptions of the contract of affreightment, by simply leaving the question as to whether or not the damage was caused by one of the ex-
286 cepted perils or dangers in doubt? I think not. The carrier does not thereby overcome the presumption of negligence which the law raises against him. He cannot absolve himself from blame by merely showing such a state of facts that the court is unable to deduce how and in what manner the damage has arisen. He must show affirmatively that the damage was caused by a peril of the sea or other cause excepted by the contract of affreightment, and this he must establish satisfactorily. He cannot leave the matter in doubt. As was aptly said in The Compta, 4 Sawy., 375; Fed. Cas. No. 3069: "The carrier, to make good his defense, is bound to show that the damage arose from a peril of the sea. It is not enough for him to show that it might have arisen from that cause. He must prove that it did."

In the case of The Centennial, 7 Fed. R., 601, the carrier was held responsible, under circumstances closely analogous to those in the case at bar, for having failed to prove distinctly that the damage to the cargo was caused by a peril of the sea. The case was on appeal to the circuit court. The facts were as follows: "The three-masted schooner Centennial sailed from Cardenas, bound to Boston, on the twenty-eighth of May, 1879, with 800 hogsheads of muscovado sugar, of which the greater part was the property of the libelants. The cargo was properly stowed and well dunnaged. According to the log book, and all the evidence of the officers and crew, the pumps were tried every four hours, and the vessel made no water of any consequence until June 3rd. On that day, at 4 o'clock in the afternoon, there was no water in
287 the hold; at 8 o'clock of the same evening there were seven feet and a half of water there, and the ship was apparently in immediate danger of foundering. Both sets of pumps were worked all that night by all hands, and in 11 hours the water had been lowered two feet. After this, the crew being exhausted, they kept watch and watch, and the forward pumps alone were kept in operation, and were able to prevent any increase above the five feet and a half until the vessel arrived at Philadelphia, a port of necessity, on the sixth of June. Here the schooner was pumped out, and her cargo was discharged, and it was found that some of her seams and butts were slack. No extraordinary injury was discovered. She was caulked and reloaded and brought her cargo to Boston, but it had already suffered the damage which the district court has found to be justly chargeable to the vessel." Lowell, circuit judge, said in the introductory part of his opinion: "The duty of ascertaining the facts of this case is a difficult and delicate one. That a great loss has happened is certain, but its causes are so obscure that every possible theory offered to account for it is open to most

plausible objection. Then, after stating the facts as recited above, he continued: "The libelant introduced evidence tending to show that the schooner was of a model and build unsuited to the heavy cargo of sugar which she undertook to carry, and that the caulking of her seams had been neglected. The claimant met these allegations; and, upon the whole evidence, the district judge was of opinion that the schooner was, in these particulars, sufficient
288 and suitable for the voyage. I am of the same opinion. But behind this is the question how so much water came into the vessel without being discovered? The condition of the vessel, when she was examined, would not account for seven feet of water being found in the hold four hours after it had been pumped dry, or found to be dry." After taking up and discussing the various theories as to the cause of the leak, the learned judge proceeds: "The district judge held that the owners of the ship had not explained the damage sufficiently to satisfy him that it had occurred by a peril of the sea, within the true intent of the bill of lading." In this conclusion, the circuit judge fully agreed, for he found, as matters of fact: "(1) that the vessel was reasonably fit for the voyage in respect to her build and caulking; (2) that the claimants (the ship-owners) have failed to prove distinctly that the damage to the cargo was caused by perils of the sea;" and he affirmed the decree of the district court holding the vessel liable for the damage sustained to the cargo of sugar.

In the case at bar as in the case cited from, the carrier sets up a peril of the sea, but fails to explain the cause of the damage sufficiently to justify the court in holding that the leak is attributable to any accident, danger, or peril of the sea, or of navigation. In the Mascotte, 2 U. S. App., 399; S. C., 51 Fed. R., 605, the same principle was affirmed. A libel had been brought against the steamship Mascotte for damages to the cargo. The district court entered a decree for libelants. In the course of his opinion (48 Fed. R., 605), the district judge (Brown) said: "As respects
289 the claim for damage to tea caused by oil, the bill of lading, as well as the master's testimony, shows that the chests were received on board in good condition. Some of the chests on delivery were, beyond doubt, oil-stained and defaced. All that the claimants can do to exonerate the ship has doubtless been done; but after all, the evidence shows nothing more than that they cannot explain how the stains and defacing occurred. It negatives certain causes that might, under some circumstances, have produced the damage; but this is not, I think, sufficient to release the ship of her legal obligation. The ship has possession and control of the goods from the time they are delivered into her custody. If the goods are received in good condition, as this bill of lading shows they were, she warrants their delivery in like condition, unless damaged through the act of God, public enemies, the dangers of the seas, or through some other excepted cause. The Montana, Liverpool & G. W. Steam Co. *v.* Phenix Ins. Co., 129 U. S., 397, 437; 9 Sup. Ct. Rep., 469. The burden of showing that the damage arose from such an excepted cause is upon the ship. Nelson *v.*

Woodruff, 1 Black, 156. As the Mascotte's evidence does not show this, but merely leaves the damage unexplained, I must therefore hold the ship liable for this item." On appeal to the circuit court of appeals, that court affirmed the decree of the lower court in the following concise opinion: "We agree with the learned district judge who decided this case in the court below, that the libelants have a sufficient case for the recovery of their damages, by reason of non-delivery of their cargo in good order and condition.
290 The burden of proof is on the steamship to overcome the effect of the acknowledgment in the bill of lading of the reception of the goods on board 'in good order and condition,' and the evidence introduced on her behalf is not sufficient to overcome the effect of this recital."

In Hastings *v.* Pepper, 11 Pick., 44, Chief Justice Shaw probably carried the rule to its utmost limit when he said that "negligence and breach of contract being proved, the defendant is bound to stand the loss, unless he can prove clearly that the loss was in no way attributable to that cause, or rather to prove affirmatively, and beyond reasonable doubt, what was the cause of the loss."

The cases of The Samuel E. Spring, 29 Fed. R., 397, and of The Lydian Monarch, 23 Fed. R., 298, are also very much in point, and the vessels in both of those cases were held liable for failing to show that the damage to the goods shipped on board had been caused by a peril of the sea. Counsel for claimant cites and quotes from the case of Kennedy *v.* The Bibber, 50 Fed. R., 841, the following language: "If, on the whole, it is left in doubt what the cause of the injury was, or if it can as well be attributed to perils of the sea as to negligence, the plaintiff cannot recover." But this language is plainly inapplicable to the case at bar, for the simple reason that the claimant has failed to establish such facts from which a peril of the sea can be reasonably, or at all, predicated.

The contention of claimant that the libelants, having alleged negligence, must prove it affirmatively, and that they cannot
291 rely merely upon the *prima facie* presumption of negligence which the law raises upon proof of the return of the goods in a damaged state, is not tenable. For if this were so, it would do away entirely with the *prima facie* presumption of negligence against the carrier. As is well said in Hall *v.* Railroad Companies, 13 Wall., 372: "When a loss occurs, unless by act of God, or of public enemy, he (the carrier) is always in fault. The law raises against him a conclusive presumption of misconduct, or breach of duty, in relation to every loss not caused by excepted perils. Even if innocent, in fact, he has consented by his contract to be dealt with as if he were not so." It would, therefore, be enunciating a somewhat novel doctrine, to say the shipper is called upon to prove affirmatively that which, upon certain preliminary proof, the law presumes against the carrier. I am of the opinion that the claimant (the carrier) has failed in his proofs to bring himself within the exception, claimed by him, of a peril of the sea.

It is further contended, with respect to the libel of the firm of Hellman, Haas & Co., that if the loss sustained by them was paid

by the insurance company—which is the real party suing in this case—prior to the dissolution, by the death of one of its members, of the insured partnership, and it is claimed that, in such a case, the surviving partners—the firm no longer being interested in the result of the suit—have no authority to sue; the authority of the surviving partners being limited to a settlement of the partnership affairs as provided by sections 2458–2462 of the Civil Code of California. It is argued that, under such conditions, the insurer,
292 having paid the loss and thereby become subrogated to the partnership rights during the lifetime of Jacob Haas, had the right to sue in the partnership name so long as the partnership existed, but that it could not sue, as it has done in this case, in the name of the surviving partners of the deceased partnership. When the insurance company paid the loss sustained by the goods shipped by Hellman, Haas & Co., it became subrogated in a corresponding amount to the assured's right of action against the carrier, without any formal assignment or any express stipulation to that effect in the policy of insurance, and might assert that right to sue in its own name in a court of admiralty. Liverpool & G. W. Steam Co. *v.* Phenix Ins. Co., 129 U. S., 397. It is also equally well settled that an insurer of goods is entitled, after he has paid the loss, to recover what he has paid, in a suit in the name of the assured (as in the case at bar) against the carrier. Hall *v* Railroad Cos., 13 Wall., 367. Having become subrogated to the right of the assured partnership during the lifetime of all the partners, the death of one of the partners subsequent to the loss and its payment by the insurance company should not prejudice its rights or prevent it from recovering from the carrier for the loss sustained to the goods. The right to sue acc-ued before the death of the partner, and I am of the opinion that the insurance company has the right to use the name of the partnership firm in bringing this suit against the carrier.

It is also contended by claimant that the method employed by Hellman, Haas & Co., to ascertain the value of their damaged shipment, which was by a sale at public auc-
293 tion, was not a proper one and that the proceeds of that sale do not represent the true market value of the damaged goods. I do not understand that the regularity or fairness of the sale is impugned nor that any more could have been obtained for them at private sale. It is difficult to see what good an appraisement would have subserved, for the goods, in their damaged, and some of them, in their deteriorating condition had to be sold, and what they brought at public auction is probably the best indication of their actual market value. As was very correctly said in the Columbus, 1 Abb. Adm., 37, Fed. Cas. No. 3043, by Betts, district judge: "Sale by auction is in the great marts of commerce so commonly resorted to by merchants to ascertain the value of deteriorated merchandise, that it may almost amount to an usage of trade. It furnishes, cheaply and promptly, all the accuracy which can be expected in any known measure of damages, and it is peculiarly fitting, in cases of this character, that the court should sanction and

sustain it as the method best adapted to protect the interests of all parties concerned." This contention will, therefore, be overruled.

The objection that the steamer was not within the jurisdiction of the court when the libel was filed, it being claimed that she was without the northern district of California, was also renewed upon the final arguments. The objection was urged and decided adversely to claimant when the exceptions to the libel were presented and passed upon. (See opinion, 61 Fed. R., 213, 214.) When the libelants put in their case, they introduced some testimony tend-
294 ing to establish that the vessel was within the jurisdiction of the court when the libel was filed. (See opinion on motion for a judgment in favor of claimant, 75 Fed. R., 74, 75.) Nothing that the testimony in the case has developed since the motion for a judgment in favor of claimant was denied has led me to alter my views and decision in this regard.

Upon the whole of the case, I am of the opinion that the libelants have made out their case, within the rules of law, against the claimant, and that the latter has failed to bring himself within any of the exceptions provided by the shipping receipts or contracts of affreightment, which would relieve him from liability for the damages sustained to the various shipments made on board the steamer "Queen," under the contracts referred to.

Let a decree be entered in favor libelants, and let the case be referred to the commissioner to ascertain the damages suffered by each shipment, unless the parties can reach some understanding and agreement respecting the amount of damages to be awarded.

(Endorsed:) Filed November 25th, 1896. Southard Hoffman, clerk, by J. S. Manley, deputy clerk.

(Style of Court and Title of Cause.)

Interlocutory Decree.

The above-entitled causes having been, for the purposes of trial, consolidated, and said causes having been heard on the plead-
295 ings and proofs, and the advocates for the respective parties to each of said causes having been heard, and due deliberation being had in the premises,

It is now ordered, adjudged and decreed that the said libelant, Bancroft-Whitney Company, do have and recover the damages sustained by said libelant by reason of the causes and matters in its said libel set forth: and

It is further ordered that said cause be and the same hereby is referred to Southard Hoffman, Esquire, clerk of this court, as commissioner, to ascertain and compute the said damages by the said libelant sustained, and to report the same to this court with all convenient speed; and

It is further ordered, adjudged and decreed that the libelants H. W. Hellman and A. Haas and J. Baruch, doing business under the firm name of Hellman, Haas & Company, do have and recover

the damages sustained by them by reason of the matters and things in their said libel set forth and mentioned; and

It is further ordered that said cause be, and the same hereby is referred to Southard Hoffman, Esquire, clerk of this court, as commissioner, to ascertain and compute the said damages by the said libelants sustained, and to report the same to this court with all convenient speed.

WM. W. MORROW, *Judge.*

(Endorsed:) Filed May 7th, 1897. Southard Hoffman, clerk. Entered in Book 3, "Judgment and Decree," p. 391.

296 At a stated term of the district court of the United States of America for the northern district of California, held at the court-room, in the city of San Francisco, on Friday, the 23d day of July, in the year of our Lord one thousand eight hundred and ninety-seven.

Present: The Honorable John J. De Haven, judge.

BANCROFT-WHITNEY COMPANY ET AL.
vs.
S. S. "QUEEN OF THE PACIFIC," ETC.

Order Referring Cause to James S. Manley, U. S. Commissioner.

On motion of Milton Andros, Esq., proctor for libelants, and it appearing to the court that the terms of office of Southard Hoffman, Esq., as commissioner of the U. S. circuit court, northern district of California, to whom this cause was on the 17th day of May, 1897, referred to take proofs, etc., has expired, it is now ordered that this cause be and the same is hereby referred to James S. Manley, U. S. commissioner, to take proofs of the damages sustained by the libelant, and to ascertain and compute the same and make due report to this court, with all convenient dispatch.

297 (Style of Court and Title of Cause.)

Report of Commissioner on Libel of Bancroft-Whitney Co.

Testimony on reference to ascertain and compute amount of damages sustained by libelant Bancroft-Whitney Co.

SATURDAY, *August* 28, 1897.

Present: Milton Andros, Esq., proctor for libelant, and Geo. W. Towle, Jr., Esq., proctor for claimant.

Mr. Andros offered in evidence the stipulation entered into between the respective proctors upon the hearing of this cause and as set out in the opening statement of Mr. Andros, as appears on page 4 of the testimony taken upon the hearing of this cause—that it was agreed that whatever damage was sustained by the libelant, the Bancroft-Whitney Co., should be taken and deemed to be the sum of $200

and it shall be unnecessary to put any proofs into the case in respect to their damages.

To this proof of damages, Mr. Towle objects to being introduced at this time upon the reference, upon the ground that it was a stipulation in the case, and therefore not a proper subject-matter of the reference to ascertain and state the amount of damage.

Objection overruled and proof introduced.

FRIDAY, *September* 10, 1897.

Present: Milton Andros, Esq., proctor for libelant, and Geo. W. Towle, Jr., Esq., proctor for claimant.

It is agreed by and between Mr. Andros and Mr. Towle, that no claim was presented by the Bancroft-Whitney Company,
298 against the S. S. "Queen" or against her master or agents or owners, for any damage to any of the merchandise mentioned in the libel of the above-named parties, prior to or other than the filing of the libel in this case in this court, unless it shall appear otherwise in the testimony heretofore taken and on file in this case.

(Style of Court and Title of Cause.)

Commissioner's Report.

In pursuance of an order made in this cause on the 23d day of July, 1897, referring this cause to the undersigned U. S. commissioner, to ascertain and compute the amount due the libelant, The Bancroft-Whitney Company, for damages sustained, and to report thereon to this court with all convenient speed:

I, James S. Manley, United States commissioner, do report that I have been attended by Milton Andros, Esq., proctor for libelant, and Geo. W. Towle, Jr., Esq., proctor for the claimant, and have taken and examined the testimony offered; and do find, and therefore report, that there is due to the libelant, The Bancroft-Whitney Company, for damages mentioned in the libel, the sum of two hundred dollars.

Dated September 13th, 1897.

All of which is respectfully submitted:

J. S. MANLEY,
United States Commissioner for the Northern District of California, at San Francisco.

299 (Endorsed:) Filed September 13th, 1897. Geo. E. Morse, clerk.

(Style of Court and Title of Cause.)

Report of Commissioner on Libel of Hellman, Haas & Co.

Testimony on reference to ascertain and compute the amount of damages sustained by libelant, Hellman, Haas & Co.

SATURDAY, *August* 28, 1897.

Present: Milton Andros, Esq., proctor for libelant, and Geo. W. Towle, Jr., Esq., proctor for claimant.

Mr. Andros offered in evidence the testimony of Abraham Haas, taken in court upon the hearing of this cause, or so much of it as relates to the question of damages, as the same appears on pages 7 to 15 inclusive, of the testimony on file in this cause.

Mr. TOWLE: I object to the testimony of Mr. Haas, on the question of damages, being received, upon the ground that the witness appears to have had no knowledge of the market value of the merchandise, the damage to which is in controversy in this proceeding; and on the further ground that all the statements of the witness, relating to the merchandise in question, particularly in relation to any values stated by him of such merchandise, were hearsay and irrelevant, immaterial, incompetent and inadmissible.

And object further to any evidence being offered here at
300 this time, upon the ground that the question of damage was gone into by libelant upon the trial; that libelant introduced such evidence as it chose, and rested its case without reserving any right to introduce further evidence relating to damage, either before the court, or upon reference to ascertain and determine the amount of damages, if any, suffered by the libelant.

Objection overruled and evidence introduced.

Mr. Andros then offered in evidence the testimony of E. W. Newhall, taken in court upon the hearing of this cause, as the same appears on pages 23 to 27 inclusive, of the testimony on file in this cause.

Mr. TOWLE: Objected to first, upon the ground last stated in the previous objection, next upon the ground that it appears from the testimony of this witness that he had no knowledge of the quality or market value of any of the merchandise in question; nor did he have any knowledge of the extent of the damage, if any, which the merchandise sustained at the time to which his testimony refers, nor did he have any knowledge of the market value of the merchandise or any thereof, in the condition in which the same was at the time to which his testimony relates;

And upon the further ground that his testimony is irrelevant, incompetent, inadmissible and hearsay.

Objections overruled and evidence admitted and introduced.

Mr. Andros then rested.

Further hearing continued to a day to be agreed upon by proctors.

301 FRIDAY, *September* 10*th*, 1897.

Present: Milton Andros, Esq., proctor for libelant, and Geo. W. Towle, Jr., Esq., proctor for claimant.

It is agreed by and between Mr. Andros and Mr. Towle, that no claim was presented by Hellman, Haas & Co., or Madgeburg General Insurance Company, or I. Gutte, its agent, against S. S. "Queen," or against her master or agents or owners, for any damage to any of the merchandise mentioned in the libel of the above-named parties, prior to or other than the filing of the libel in this case in this court, unless it shall appear otherwise in the testimony heretofore taken and on file in this case.

(Style of Court and Title of Cause.)

Commissioner's Report.

In pursuance to an order made on the 23d day of July, 1897, referring this cause to the undersigned U. S. commissioner, to ascertain and compute the amount due to the libelant Hellman, Haas & Co., for damages sustained; and to report thereon to this court with all convenient speed:

I, James S. Manley, United States commissioner, to whom the matter was referred, do report that I have been attended by Milton Andros, Esq., proctor for libelant, and Geo. W. Towle, Jr., Esq., proctor for the claimant, and have taken and examined the testimony offered by the proctors respectively, which testimony is hereto attached:

302 The proctor for the claimant takes the position, as I understand it, that the damage sustained by libelant, if any, is the difference between the market value of the merchandise at the time of shipment and the market value in its damaged condition, which I believe to be the true mode to ascertain the damage. The question is how to ascertain the market value.

The proctor for the claimant claims that the amount realized at a sale by auction is not the correct mode of determining the damage, but this court in this case at the hearing went into the question of damage—heard testimony—and in its opinion reported on page 172 of vol. 78, Fed. Rep., determined that a sale at public auction to be the proper method of ascertaining the amount of damage sustained.

The proctor for the claimant also claims that there has been no proof of the market value of the merchandise at, or shortly before, the time of the shipment.

I find from the testimony of Abraham Haas that the market value of the merchandise of libelant, Hellman, Haas & Co., at the time of the shipment, was the sum of.... .... $10,205.13

That the market value of the merchandise in its damaged condition was the net sum realized at the auction sale of Newhall & Co., amounting to..... 1,190.00

And I do find, and therefore report that the difference of the two amounts is the amount of damage
303 sustained by, and due to, the libelant Hellman, Haas & Co., which is the sum of..... $9,015.04

Dated Sept. 13th, 1897.

All of which is respectfully submitted.

J. S. MANLEY,
United States Commissioner for the Northern District of California, at San Francisco.

(Endorsed:) Filed September 13th, 1897. Geo. E. Morse, clerk.

(Style of Court and Title of Cause.)

Exceptions to Report of Commissioner in Favor of Bancroft-Whitney Co.

The respondent and claimant hereby excepts to the report of the commissioner, J. S. Manley, made herein, and by him filed on the 13th day of September, 1897, for the following causes, that is to say:

First. Because said commissioner hath found and reported that damages in the sum of $200 have been sustained by Bancroft-Whitney Co.

Second. Because said commissioner hath not found and reported in favor of claimant, that is, that no claim for damage has been sustained, upon the stipulation of the contract set forth in the libel, as follows: "It is expressly agreed that all claims against the P. C.
S. S. Co. * * * for damage to or loss of any of the within
304 merchandise must be presented to the company within thirty days from date hereof * * * and the lapse of said thirty days shall be deemed a conclusive bar and release of all right to recover against said company * * * for any such damage or loss."

GEO. W. TOWLE, JR.,
Proctor for Respondent and Claimant.

(Endorsed:) Service of the within exceptions and receipt of a copy admitted this 16th day of September, 1897. Milton Andros, proctor for Libelants. Filed Sept. 16th, 1897. Geo. E. Morse, clerk.

(Style of Court and Title of Cause.)

Exceptions to Report of Commissioner in Favor of Hellman, Haas & Co.

The respondent and claimant hereby excepts to the report of the commissioner, J. S. Manley, made herein, and by him filed on the

13th day of September, 1897, for the following causes, that is to say:

First. Because said commissioner hath not, in his said report, found and reported, that no damages had been proven to have been sustained by said merchandise, or any thereof, by the evidence produced before him.

Second. Because said commissioner hath found and reported that the market value of the merchandise referred to in the libel
305 was, at, or near to, the time of shipment thereof, the sum of $10,205.13, when the evidence presented to him, and reported by him, was not and is not sufficient to show that such sum, or that any material part of such sum, was then the market value, or the then cash value of the same, or of any thereof.

Third. Because said commissioner hath found and reported that said merchandise was damaged and that the market value of the said merchandise in its damaged condition was the net sum realized at the auction sale thereof to Newhall & Co., amounting to the sum of $1,190.09, only, when the evidence presented to him, or reported by him, was not, and is not sufficient to sustain such finding and report in any material particular.

Fourth. Because the report of said commissioner is based upon what he conceives to be the market value of the said merchandise at the place of shipment, at the date of shipment, whereas by the contract alleged in the libel it is expressly agreed that "in settlement of any claim for loss or damage to any of the within mentioned goods, said claim shall be restricted to the cash value of such goods at the port of shipment at the date of shipment."

Fifth. Because said commissioner hath found and reported that the amount of damage to said merchandise is the difference between two sums stated by him, to wit, between the sum of $10,205.13, and the sum of $1,190.09; that is, $9,015.14, when there was no evidence presented to said commissioner, or reported by him, which showed, or which tended to show, or which shows the extent of any damage to said merchandise, or to any thereof.

306 Sixth. Because said commissioner hath not found and reported that no damage to said merchandise had been proven by the evidence presented to, and reported by him.

Seventh. Because the testimony of Abraham Haas produced before, and received and considered by said commissioner, was not competent, or relevant, or material, or admissible, to show the cash value or the market value of said merchandise or of any thereof, and was all secondary and hearsay, and not the best evidence of the market value, or the cash value of the merchandise, either sound or damaged.

Eighth. Because the testimony of Abraham Haas produced before and received and considered by, and reported by, said commissioner did not, and does not show or tend to show, the extent, or amount of damage, if any, to said merchandise, or to any thereof, and the same and all thereof was inadmissible, incompetent, secondary, and hearsay.

Ninth. Because the testimony of E. W. Newhall produced before

and received and considered by, and reported by, said commissioner was not, and is not, competent, or relevant, or material, or admissible to show the market value of or the cash value of, or the damage to, said merchandise, or any thereof, at any time, either sound or damaged; and such testimony was not the best evidence to prove damage to, or the value of, such merchandise, either sound or damaged.

307 Tenth. Because said Abraham Haas was not a competent witness to testify to any fact relating to value of, or to damage to, said merchandise, or any thereof.

Eleventh. Because said E. W. Newhall was not a competent witness to testify to any fact relating to the value of, or to the damage to, said merchandise, or any thereof.

Twelfth. Because said commissioner hath found and reported, that damages in the sum of $9,015.04 has been sustained by Hellman, Haas & Co., when there is no evidence reported by him to sustain such finding and report.

Thirteenth. Because said commissioner hath not found and reported in favor of claimant, that is, that no claim for damage has been sustained, upon the stipulation of the contract set forth in the libel, as follows: "It is expressly agreed that all claims against the P. C. S. S. Co. * * * for damage to or loss of any of the within merchandise must be presented to the company within thirty days from date hereof * * * and the lapse of said thirty days shall be deemed a conclusive bar and release of all right to recover against said company * * * for any such damage or loss."

GEO. W. TOWLE, JR.,
Proctor for Claimant and Respondent.

(Endorsed:) Service of the within exceptions and receipt of a copy admitted this 16th day of September, 1897. Milton Andros, proctor for libelants. Filed Sept. 16th, 1897. Geo. E. Morse, clerk.

308 (Style of Court and Title of Cause.)

Opinion Overruling Exceptions.

The principal questions discussed by the proctor for the claimant in his argument upon the hearing of claimant's exceptions to the report of the commissioner filed herein, were all considered by this court and passed upon adversely to the contention of the claimant, in its previous opinions filed in this case and reported in 61 Fed. Rep., 213, 75 Fed. Rep., 74, and 78 Fed. Rep., 155. If it should be assumed that the questions heretofore decided by the court and leading up to the interlocutory decree, are open to re-examination at this time, and if found to be erroneous may be corrected in the final decree, still these questions should not be reopened and the former rulings set aside, unless it is made to appear that manifest error has been committed. I am not satisfied that the rulings complained of are erroneous, or that the general conclusion of the court as pronounced in the opinion reported in 78 Fed. Rep., 155, that the

claimant failed upon the trial to show that the damage to the goods of libelants was not caused by the negligence of those in charge of the steamship, is not justified by the evidence.

The exceptions will be overruled and a decree will be entered in favor of the libelants in accordance with the report of the commissioner, and for costs.

(Endorsed:) Filed April 19th, 1898. Geo. E. Morse, clerk, by J. S. Manley, deputy clerk.

309 (Style of Court and Title of Cause.)

Final Decree.

This cause coming on to be heard on the exceptions of the claimant to the report of James S. Manley, Esquire, the commissioner to whom the same was referred to ascertain the damages sustained by the libelants Bancroft-Whitney Company, for the causes in their said libel set forth, and to report the same to this court; and the advocates for the respective parties having been heard, and due deliberation having been had in the premises by the court—

It is hereby ordered, adjudged, and decreed that said exceptions be and the same hereby are overruled and disallowed, and that the report of said commissioner be and the same hereby is in all respects confirmed; and

It is further ordered, adjudged, and decreed that the said libelants Bancroft-Whitney Company do have and recover for the causes in their said libel mentioned, the sum of two hundred dollars, the amount reported to be due to them by said commissioner, together with interest thereon at the rate of seven per cent. per annum from the 19th day of April, 1898, the date of the order overruling the exceptions of the claimant to the commissioner's report, in the sum of sixty-six cents, amounting in all to the sum of two hundred dollars and sixty-six cents, together with their costs to be taxed; and

310 It is further ordered, adjudged, and decreed that unless an appeal be taken from this decree within the time limited by the rules and practice of this court (after notice of this decree to George W. Towle, Esquire, the proctor for the claimant herein), that the Pacific Coast Steamship Company, and John L. Howard and George C. Perkins, the stipulators for value on the part of the claimant of the said steamship "Queen of the Pacific," cause the engagement of their said stipulation to be performed, or show cause within four days after the expiration of said time to appeal, or on the first day of jurisdiction thereafter, why execution should not issue against their goods, chattels, and lands for the amount of this decree, with interest thereon, according to their said stipulation.

JOHN J. DE HAVEN, *Judge.*

(Endorsed:) Filed May 6th, 1898. Geo. E. Morse, clerk, by J. S. Manley, deputy clerk. Entered in Judgment & Decree Bk. 3, p. 442

(Style of Court and Title of Cause.)

Final Decree.

This cause coming on to be heard on the exceptions of the claimant to the report of James S. Manley, Esquire, the commissioner to whom the same was referred to ascertain the damages sustained by the libelants A. Haas and others, surviving partners of the firm of Hellman, Haas & Company, for the causes in their said libel
311 set forth, and to report the same to this court; and the advocates for the respective parties having been heard, and due deliberation having been had in the premises by the court—

It is ordered, adjudged, and decreed that said exceptions be and the same hereby are overruled and disallowed, and that the report of said commissioner be and the same hereby is in all respects confirmed; and

It is further ordered, adjudged and decreed that the said libelants, A. Haas, J. Baruch and H. W. Hellman, do have and recover for the causes in their said libel mentioned, the sum of nine thousand and fifteen dollars and four cents, the amount reported to be due to them by said commissioner, together with interest thereon at the rate of seven per cent. per annum from the 19th day of April, 1898, the date of the order overruling the exceptions of the claimant to the commissioner's report, in the sum of twenty-nine dollars and eighty cents, amounting in all to the sum of nine thousand and forty-four dollars and eighty-four cents, together with their costs to be taxed; and

It is further ordered, adjudged and decreed that unless an appeal be taken from this decree within the time limited by the rules and practice of this court (after notice of this decree to George W. Towle, Esquire, the proctor for the claimant herein) that the Pacific Coast Steamship Company, and John L. Howard and George C. Perkins, the stipulators for value on the part of the claimant of the
312 said steamship "Queen of the Pacific," cause the engagement of their said stipulation to be performed, or show cause within four days after the expiration of said time to appeal, or on the first day of jurisdiction thereafter, why execution should not issue against their goods, chattels and lands for the amount of this decree, with interest thereon, according to their said stipulation.

JOHN J. DE HAVEN, *Judge.*

(Endorsed:) Filed May 6th, 1898. Geo. E. Morse, clerk, by J. S. Manley, deputy clerk. Entered in Judgment and Decree Book 3, page 440.

(Style of Court and Title of Cause.)

Petition for Appeal.

To the Honorable John J. De Haven, judge of the district court of the United States for the northern district of California:

And now, by its proctor, Geo. W. Towle, Jr., comes the Pacific Coast Steamship Company, claimant in the above-entitled cause,

and having filed with the clerk of said district court an assignment of errors, prays this honorable court to allow an appeal to the United States circuit court of appeals for the ninth circuit, from the final decree of the district court in the above-entitled cause, made and entered on the 6th day of May, 1898, in favor of the libelant, Bancroft-Whitney Company, and from the final decree made and
313 entered in favor of the libelants A. Haas, J. Baruch and H. W. Hellman, surviving partners of the firm of Hellman, Haas & Company.

Dated at San Francisco, this 14th day of May, 1898.

GEO. W. TOWLE, JR.,
Proctor for Claimant.

(Endorsed:) Filed May 14th, 1898. Geo. E. Morse, clerk, by J. S. Manley, deputy clerk.

(Style of Court and Title of Cause.)

Assignment of Errors.

Now comes Pacific Coast Steamship Company, a corporation, claimant and appellant herein, and assigns errors in the rulings of the court and in its proceedings, orders, decisions, and decrees herein, as follows, to wit:

I.

The order overruling claimant's exceptions to the said several libels, and particularly the following exceptions thereto, to wit: "First exception. For that the said libel and each of said libels shows that libelant and each of said libelants has no cause of action against and no lien upon the said steamer 'Queen of the Pacific,' otherwise called 'Queen,'" was and is, and is here assigned as, error.

II.

The order overruling claimant's exceptions to the said sev-
314 eral libels and particularly the following exception thereto, to wit: "Third exception. For that the cause and causes of action set forth in said libel and in said libels, each, every and all thereof, is and are in said libel, and in said several libels shown to have been waived and abandoned by each of said libelants respectively and prior to the filing of the said libel and libels herein under the provisions of a special contract made in that behalf by each of said libelants with the said Pacific Coast Steamship Company, as in said libel alleged," was and is, and is here assigned as, error.

III.

The order overruling claimant's exceptions to the said several libels and particularly the following exception thereto, to wit: "Fourth exception. For that said libel and each of said libels shows that the demand and demands asserted therein and thereby is and are and each of them is and all of them are stale, neglected

and legally abandoned, and are barred by virtue of the laws of the State of California relating thereto, to wit, sections 337 and 338 of the C. C. P., and secs. 2174, 2909 and 2911 of the Civil Code of said State," was and is, and is here assigned as, error.

IV.

The order overruling claimant's exception to said several libels, specified as follows: "And further excepting to said libel and said libels, claimant alleges that this court has not jurisdiction in the matters alleged because said steamship 'Queen of the Pacific,' otherwise called 'Queen' etc., etc., was not when said libel and said libels were filed in this court, within the northern district of
315 California, or within the jurisdiction of this honorable court," was and is, and is here assigned as, error.

V.

The order overruling claimant's exception to said several libels, specified as follows: "And further excepting to said libel and said libels claimant alleges that said steamship was not attached by the marshal upon process issued in this proceeding until the 4th day of May, 1892, more than four years after the alleged injury and injuries complained of, prior to which time any lien theretofore existing upon said steamer by reason of any of the matters alleged in said libel and said libels had expired by special contract alleged, and by operation of law," was and is, and is here assigned as, error.

VI.

The court erred in overruling claimant's objection to the following questions propounded at the trial by proctor for libelants, to the witness Abraham Haas, and in admitting in evidence, and considering upon the question of damages, the testimony of said witness, and in refusing to strike out portions of the testimony of that witness when moved thereto by claimant, all as more particularly hereinafter specified, to wit: The witness, Abraham Haas, called for libelants, had testified, on behalf of libelants, that he was, on the 27th day of April, 1888, a member of the firm of Hellman, Haas & Co., merchants; that that firm was then composed H. W. Hellman, Jacob Haas, witness, and J. Baruch; that Jacob Haas died
in June or July, 1889; that he, witness, was in this city when
316 when the steamer 'Queen'" sailed on the voyage in question; that his firm had merchandise on that steamer, consigned to his firm at Los Angeles; that a paper shown witness and marked "merchandise on steamer 'Queen'" was "either the bill or a copy of the bill which we handed to Gutte & Frank for the goods shipped on the "Queen;" when the following questions were propounded to witness by Mr. Andros:

"Q. Do you know what goods were shipped on board of her?

"A. I know by the bills.

"Q. Please to state. Refresh your memory from that paper and state what they were.

"Mr. TOWLE: I object to any testimony from that paper.

"Mr. ANDROS:

"Q. In whose handwriting is that?
"A. This is in the handwriting of a clerk of ours who was with us then and who is with us now in Los Angeles.

"The COURT:

"Q. Do you know anything about that paper yourself?
"A. Nothing more than I told the young man to make it out at the time. He made it under my supervision. * * *

"Mr. ANDROS:

"Q. I will ask you to see, as I read this, whether it corresponds with what is on the back of this bill of lading. 50 cases of canned vegetables.

"Mr. TOWLE: We object to that as irrelevant, immaterial and incompetent, whether it agrees with the memorandum or not.
"Mr. ANDROS: I propose to prove the cost price of these goods by Mr. Haas, and I want to simply identify these goods by that memorandum so that he may testify as to the cost.
317 "Mr. TOWLE: So far as it has a bearing upon the question of price—if the witness proposes to testify from that memoranda as to prices, we shall object to that. We object to these questions. If the witness is to testify, he can as well testify from the items on the bill of lading as from a memorandum which agrees with those items.
"The COURT: His memorandum probably has the prices attached.
"Mr. ANDROS: Yes, sir.

"Q. 50 cases of canned vegetables; what was the price of this, Mr. Haas?

"Mr. TOWLE:

"Q. Are you testifying from your memorandum or from your own knowledge?
"A. I am testifying from the memorandum.

"Mr. ANDROS:

"Q. Did you at the time know the cost of these goods?
"A. Yes, sir.
"Q. Did you buy them?
"A. Yes, sir.
"Q. Bought them yourself here?
"A. Either bought them myself, or they were bought under my supervision.
"Q. So at that time you did not know what they cost?
"A. Yes, sir.
"Q. Did you subsequently instruct that memorandum of that cost to be made?

"A. Yes, sir.

"Q. At the time that you made that memorandum yourself, or had it made under your supervision, were the figures therein mentioned the true cost of those goods?

"A. Yes, sir.

"Mr. TOWLE: We ask that that answer be stricken out. We object to that as irrelevant, immaterial and incompetent testimony; that the witness cannot prove these values by some figures appearing on a paper. * * * We submit that the only memorandum that can be used is one made by himself at the time. * * *

318 "The WITNESS: It was our book-keeper. * * *

"Mr. ANDROS:

"Q. With reference to the time these goods were shipped, when was this memorandum made?

"A. I suppose immediately after the ship went down.

"The COURT:

"Q. I understood you to say that you knew that the charges there were correct at the time?

"A. Yes, sir.

"Q. At that time?

"A. They were made from the invoices, copy of the invoices.

"Mr. TOWLE:

"Q. Mr. Haas, did you compare that memorandum with the invoices after it was handed to you?

"A. That I am not sure of, but I imagine that I did. * * *

"Q. Hellman, Haas & Co. still exists?

"A. Their successors exist.

"Q. Their books of account at that time still exists?

"A. I think they do.

"Q. You know from whom these goods were bought?

"A. Yes, sir; they can be dug up if the books and papers are not destroyed. * * *

"Mr. TOWLE: We submit that this memorandum is not the best evidence.

"The COURT: I think it comes within the rule that where a person knows the correctness of a book, he may refresh his recollection although the entry may not have been made by him. Motion to strike out denied.

"Mr. TOWLE: Save an exception."

And appellant here specifies the ruling of the court last aforesaid as error.

"Mr. ANDROS:

"Q. What was the cost price of the 50 sacks of canned vegetables?

"Mr. TOWLE: We object to that question because the answer will

be based upon that memorandum which the witness holds in his hand.

319 "The COURT: Objection overruled.
"Mr. TOWLE: Exception."

And appellant here specifies the ruling of the court last aforesaid as error.

"A. 100 dozen asparagus * * * $175.
"Q. 250 kegs of nails. * * *

"Mr. TOWLE: We object to that question so far as it is based on that memorandum. It is understood that all these questions are objected to, and exceptions saved."

The witness thereupon, in response to questions by Mr. Andros, proceeded to testify from said memorandum that the cost of 250 kegs of nails was $775; 400 sacks of rice, $2,100; 20 packages of tea, $86.40; 3 bbls. of currants, $66.55; 420 mats of rice, $861; 250 barrels of sugar, $4,921.09; 100 half barrels of sugar, $944.39; 10 cases salad oil, $90; 35 cases of pickles, $132.50; and 13 cases of drugs, $63.20.

And appellant here assigns the ruling of said court, and the admission of the testimony of said witness as to the cost of each and every of the aforementioned items, as error.

VII.

Mr. E. W. Newhall was called as a witness for libelants. On behalf of libelants, he testified that he was in April, 1888, a member of the firm of Newhall Sons & Co., auctioneers; that he remembered that goods were landed from the steamer "Queen of the Pacific" at the sea wall in a damaged condition; that his firm sold such goods at public auction; that he sold some of those goods for Hellman, Haas & Co.; that his firm catalogued and advertised
320 the goods; that he had and produced a catalogue used at the sale.

"Mr. ANDROS:

"Q. Are you able to state what goods you sold for Hellman, Haas & Co.?
"A. Identify them by the catalogue?
"Q. Yes, sir.

"Mr. TOWLE: We object to that as irrelevant, immaterial and incompetent. Whatever goods he may have sold for Hellman, Haas & Co. is immaterial from any view of this case. * * * It does not tend to show the actual value of the goods; * * * they must prove the damage by some source which goes to the condition.
"The COURT: Overrule the objection.
"Mr. TOWLE: Save an exception."

And appellant here assigns the ruling of the court last aforesaid as error.

"Mr. ANDROS:

"Q. What were the articles that you sold in a damaged condition from the steamer 'Queen of the Pacific' that belonged to, or were marked, 'Hellman, Haas & Co.?'

"A. They were marked 'H., H. & Co.' Are those the ones you want?

"Q. Yes; what were they?

"A. There were 420 mats of rice; 400 sacks of rice; 250 kegs of nails.

"Mr. TOWLE: This is all understood to be subject to the objection?

"The COURT: Yes, sir.

"The WITNESS: 20 packages of tea; 13 boxes of drugs; 10 cases of chow-chow; 25 cases of pickles; 50 cases of asparagus; 10 cases of Lucca oil; 250 barrels sugar; 100 half barrels sugar; 3 barrels currants. That is all.

"Mr. ANDROS: Did you at the time of this sale, or about
321 that time, notice the condition which the packages were in, with reference to being wet?

"A. I don't remember, it is so long ago. The goods were damaged; that I remember very distinctly.

"Q. What did these articles bring; what was the gross sale?

"Mr. TOWLE: We object to that as irrelevant, immaterial, and incompetent and not tending to prove the damage to the goods.

"The COURT: Overrule the objection.

"Mr. TOWLE: Exception."

And appellant here assigns the ruling of the court last aforesaid as error.

"A. The gross sales were $1,262.20.

"Mr. ANDROS:

"Q. What was the net?

"A. $1,190.09."

Libelants thereupon rested their case.

VIII.

The order overruling and denying the motion of claimant, made when libelants had rested their case, that a nonsuit be granted or that said libels be, severally, dismissed, was error; said motion being made upon the following grounds:

First. That it does not appear that the vessel was within the district at the time the libel was filed, and therefore that the court was without jurisdiction of this proceeding at the inception thereof.

Second. That this proceeding is based upon contracts, bearing date April 26, April 27, April 28, and April 30, 1898, and
322 which are made a part of the several libels, which contracts provide as follows: "It is expressly agreed that all claims

against the P. C. S. S. Co. * * * for damage to or loss of any of the within merchandise, must be presented to the company within thirty days from date hereof; and that after thirty days from date hereof, no action, suit or proceeding, in any court of justice shall be brought against said P. C. S. S. Co. * * * for any damage to or loss of said merchandise; and the lapse of said thirty days shall be deemed a conclusive bar and release of all right to recover against said company * * * for any damage or loss," and there being no allegation in the libel, and no proof made at the trial, that such claim had been made by libelants, or by either of them, within such thirty days, or at any time prior to the 28th day of April, 1892. And it appearing that libelants severally had knowledge of the condition of their merchandise, and of all the facts necessary to enable libelants to make, and that they were, severally able to make, a full and complete performance of such stipulation of said contracts, at least twenty (20) days prior to the expiration of said thirty days.

Third. That there is no proof that claimant, The Pacific Coast Steamship Company, or that the officers or crew of the steamer "Queen," the servants of the steamship company, *or that the officers or crew of the steamer "Queen," the servants of the steamship company,* have been, or were, guilty of any negligence in the premises.

And appellant here assigns the order of the court overruling and denying said motion, as error.

323 IX.

The court erred in sustaining the objection of libelants to the following question propounded to the witness Abraham Haas, that is to say:

"Mr. TOWLE:

"Q. The merchandise in this case was insured?

"Mr. ANDROS: I object to that question as immaterial, incompetent and irrelevant, in every respect * * *

"The COURT: I sustain the objection.

"Mr. TOWLE: I will take an exception."

And appellant here assigns the ruling of the court last aforesaid as error.

X.

Mr. A. H. Evans was called as a witness for claimant and in response to questions by proctor for claimant testified that he was employed by Goodall, Perkins & Co. in the year 1888, and prior to that time, as correspondent and general secretary; that he would open any complaint that might come addressed to Goodall, Perkins & Co., any letters or complaints with reference to the manner in which the business of the Pacific Coast Steamship Company is conducted.

"Mr. TOWLE:

"Q. Within your observation has any shipper made any protest against, or by reason of what is known as the clause, or 30-day clause, contained in the shipping receipts in use for that company?

"Mr. ANDROS: If your honor please, we object to that as incompetent and immaterial * * *

"Mr. TOWLE: We show that this is the shipping receipt
324 in common use, as appears here * * * Then we show that no shipper has ever objected to the contract upon that ground that it did not give him a reasonable time within which to present his claims in the event of loss. And we say that that is a circumstance going to show the reasonableness of this contract; that it is in general use and accepted by everybody as furnishing a reasonable time.

"The COURT: I think, Mr. Towle, that if this were a suit against the Pacific Coast Steamship Company * * * that the evidence would be admissible. But if I remember correctly, I held that this suit was against the steamship 'Queen.' * * * I think I shall have to rule that the evidence is not proper here, and sustain the objection.

"Mr. TOWLE: We take an exception."

And appellant here assigns the ruling of the court last aforesaid as error.

XI.

The court erred in its conclusion that this proceeding is not a suit or proceeding against the Pacific Coast Steamship Company, or its stockholders, within the true intent and meaning of the following provisions of the contract alleged in the several libels, to wit: "The within goods are shipped and received subject to the following conditions: * * * it is expressly agreed that all claims against the P. C. S. S. Co., or any of the stockholders of said company, for damage to or loss of any of the within merchandise, must be presented to the company within thirty days from date hereof; and that after thirty days from date hereof, no action, suit or proceeding, in any court of justice, shall be brought against said P. C.
S. S. Co. or any of the stockholders thereof, for any damage
325 to or loss of said merchandise; and the lapse of said thirty days shall be deemed a conclusive bar and release of all right to recover against said company, or any of the stockholders thereof, for any such damage or loss."

XII.

The court erred in its conclusion that claimant was not and is not, in this proceeding, entitled to the benefit of the stipulations in its behalf, contained in the contracts in the libels herein alleged.

XIII.

The court erred in excluding from its consideration, and in refusing to claimant the benefit of, the stipulation of the several con-

tracts in the libels herein alleged, reading as follows: "The within goods are shipped and received subject to the following conditions: * * * The company shall not be held responsible for any damage or loss resulting from * * * accident to or from machinery, boilers, or steam, or any other accident, or dangers of the seas, rivers, roadsteads, harbors or of sail or steam navigation of what nature or kind soever."

XIV.

The court erred in excluding from its consideration, and in refusing to claimant the benefit of, the stipulation of the several contracts in the libels herein alleged, reading as follows: "The within goods are shipped and received subject to the following conditions: * * * It is agreed that in settlement of any claim for loss of or damage to any of the within-mentioned goods, said claim
326 shall be restricted to the cash value of such goods at the port of shipment at the date of shipment; * * * that all claims against the P. C. S. S. Co. * * * for damage to or loss of any of the within merchandise must be presented to the company within thirty days from date hereof * * * and the lapse of said thirty days shall be deemed a conclusive bar and release of all right to recover against said company * * * for any such damage or loss."

XV.

The court erred in rendering judgment in favor of libelants contrary to the following express stipulation of the contracts by them alleged, to wit: "The within goods are shipped and received subject to the following conditions: * * * The company shall not be held responsible for any damage or loss resulting from fire at sea or in port, accident to or from machinery, boilers or steam, or any other accident, or dangers of the seas, rivers, roadsteads, harbors, or of sail or steam navigation of what nature or kind soever. * * * It is agreed, that in settlement of any claim for loss of or damage to any of the within-mentioned goods, said claim shall be restricted to the cash value of such goods at the port of shipment at the date of shipment. * * * It is expressly agreed that all claims against the P. C. S. S. Co. or any of the stockholders of said company, for damage to or loss of any of the within merchandise, must be presented to the company within thirty days from date hereof; and that after thirty days ftom date hereof, no action, suit or proceeding, in any court of justice, shall be brought against said P. C. S. S. Co. or any of the stockholders thereof,
327 for any damage to or loss of said merchandise; and the lapse of said thirty days shall be deemed a conclusive bar and release of all right to recover against said company, or any of the stockholders thereof, for any such damage or loss."

XVI.

The court erred in its conclusion that the cause of action in the libels herein alleged is for a breach of contract.

XVII.

The court erred in its conclusion that the cause of action in the several libels herein alleged is not based upon an alleged tort, to wit, upon negligence, as distinguished from a breach of, or a failure to perform, the stipulations of the contract alleged.

XVIII.

The conclusion that the several causes of action in the libels herein alleged were not severally barred by the provisions of section 337 of the Code of Civil Procedure of the State of California, was, and is, and is here assigned as, error.

XIX.

The conclusion that the several causes of action in the libels herein alleged were not severally barred by the provisions of section 338 of the Code of Civil Procedure of the State of California, was and is, and is here assigned as, error.

XX.

328 The finding that libelants, severally, had not been guilty of laches, and the conclusion that the several causes of action in the libels herein alleged were not, severally, barred by laches on the part of libelants, severally, and by such delay in the prosecution of the several suits as constitutes, and is, a bar to a recovery in a court of admiralty, was, and is, and is here assigned as, error.

XXI.

The finding and conclusion that the failure of libelants to present their claims for damage to the Pacific Coast Steamship Company within thirty days from the dates of said several contracts, respectively, had not operated to release, and did not release, to claimant, all their libelants' rights to recover damages in this proceeding, was and is, and is here assigned as, error.

XXII.

The court erred in its conclusion that "the negligence of said steamship company, its officers and servants," had contributed to, or had occasioned, the damage to the merchandise, as in said libels alleged.

XXIII.

The court erred in its conclusion that the damage to said merchandise was not occasioned by a peril of the sea.

XXIV.

The court erred in its conclusion that the damage to such merchandise was not the result of accident.

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XXV.

The court erred in its conclusion that the negligence of claimant, its officers or servants, occasioned, or contributed to, the damage of said merchandise.

XXVI.

The finding of the court that an open dead-light, on the steamer "Queen" was the occasion of the damage to said merchandise is without any evidence to sustain it, and is contrary to the evidence, and was and is, and is here assigned as, error.

XXVII.

The court found that the steamer "Queen" was seaworthy when she sailed on the voyage in question, and further, that the evidence tended to disprove any negligence of officers or crew on the voyage, and then adjudged, upon those facts, that claimant is liable in damages; and such judgment appellant here assigns as error.

XXVIII.

The finding of the court that the insurance company—Madgeburg General Insurance Company—had paid the loss sustained by the goods shipped by Hellman, Haas & Co., is without evidence to sustain it, and was and is, and is here assigned as, error.

XXIX.

The finding of the court that the insurance company—Madgeburg General Insurance Company—had become subrogated to the rights of Hellman, Haas & Co., during the lifetime of all the
330 partners, or at all, is without evidence to sustain it, and was and is, and is here assigned as, error.

XXX.

The finding of the court that this proceeding was and is instituted, prosecuted and maintained, by the insurance company—Madgeburg General Insurance Company—is sustained by the evidence, and the judgment entered herein in favor of the surviving partners of the firm of Hellman, Haas & Co., to wit, in favor of A. Haas, J. Baruch, and H. W. Hellman, is a judgment in favor of persons who are not parties to this proceeding, and was and is, and is here assigned as, error.

XXXI.

The finding of the court that the Madgeburg General Insurance Company has a right to maintain this proceeding in the names of the surviving partners of the firm of Hellman, Haas & Co., to wit, in the name of A. Haas, J. Baruch, and H. W. Hellman, is without evidence to sustain it, and was and is, and is here assigned as, error.

XXXII.

The interlocutory judgment or decree of the court entered herein was and is error.

XXXIII.

The order referring the cause to the commissioner to take testimony concerning, and to report the sum of, the damage to said merchandise was and is, and is here assigned as, error.

331 XXXIV.

The ruling of the commissioner upon the offer of Mr. Andros, and the objection thereto on behalf of claimant, as follows, to wit:

"Mr. Andros offered in evidence the testimony of Abraham Haas taken in court upon the hearing of this cause, or so much of it as related to the question of damages, as the same appears on pages 7 and 17, inclusive, of the testimony on file in this cause.

"Mr. TOWLE: I object to the testimony of Mr. Haas, on the question of damages, being received, upon the ground that the witness appears to have no knowledge of the market value of the merchandise, the damage to which is in controversy in this proceeding; and on the further ground that all the statements of the witness, relating to the merchandise in question, particularly in relation to any value stated by him of such merchandise were hearsay, and irrelevant, immaterial, and incompetent and inadmissible.

"Objection overruled and evidence introduced."

was and is, and is here assigned as, error.

XXXV.

The order and decree of the court confirming the acts of said commissioner in the premises, last aforesaid, was and is, and is here assigned as, error.

XXXVI.

The ruling of the commissioner upon the offer of Mr. Andros, and the objection thereto on behalf of claimant, as follows, to wit:

332 "Mr. Andros then offered in evidence the testimony of E. W. Newhall, taken in court upon the hearing of this cause, as the same appears on pages 23 to 27, inclusive, of the testimony on file in this cause.

"Mr. TOWLE: Objected to, first, upon the ground last stated in the previous objection, next upon the ground that it appears from the testimony of this witness that he had no knowledge of the quality or market value of any of the merchandise in question; nor did he have any knowledge of the extent of the damage, if any, which the merchandise sustained at the time to which his testimony refers, nor did he have any knowledge of the market value of the merchandise, or of any thereof, in the condition in which the same was at the time to which his testimony relates. And upon the further ground that his testimony is irrelevant, incompetent, inadmissible, and hearsay.

"Objection overruled, and evidence admitted and introduced. Mr. Andros then rested."

was and is, and is here assigned as, error.

XXXVII.

The order and decree of the court, confirming the acts of said commissioner in the premises, last aforesaid, was and is, and is here assigned as, error.

XXXVIII.

The court erred in confirming the report of the commissioner, J. S. Manley, in favor of A. Haas and others, made and filed
333 herein on the 13th day of September, 1897, and in overruling each of the following exceptions of claimant thereto, to wit:

First. Because said commissioner hath not, in his said report, found and reported, that no damages had been proven to have been sustained by said merchandise, or any thereof, by the evidence produced before him.

"Second. Because said commissioner hath found and reported that the market value of the merchandise referred to in the libel was, at, or near to, the time of shipment thereof, the sum of $10,203.13, when the evidence presented to him, and reported by him, was not and is not sufficient to show that such sum, or that any material part of such sum, was then the market value or the then cash value, of the same, or of any thereof.

"Third. Because said commissioner hath found and reported that said merchandise was damaged and that the market value of the said merchandise in its damaged condition was the net sum realized at the auction sale thereof of Newhall & Co., amounting to the sum of $1,190.09, only, when the evidence presented to him, or reported by him, was not and is not sufficient to sustain such finding and report, in any material particular.

"Fourth. Because the report of said commissioner is based upon what he conceived to be the market value of the said merchandise at the place of shipment, the date of shipment, whereas by the contract alleged in the libel it is expressly agreed that 'in settlement of any claim for loss or damage to any of the within-
334 mentioned goods, said claim shall be restricted to the cash value of such goods at the port of shipment at the date of shipment.'

"Fifth. Because said commissioner hath found and reported that the amount of damage to said merchandise is the difference between two sums stated by him, to wit, between the sum of $10,205.13, and the sum of $1,190.09, that is, $9,015.14, when there was no evidence presented to said commissioner, or reported by him, which showed, or which tended to show or which shows, any damage to said merchandise, or to any thereof.

"Sixth. Because said commissioner hath not found and reported that no damage to said merchandise had been proven by the evidence presented to, and reported by, him.

"Seventh. Because the testimony of Abraham Haas produced

before and received and considered by, said commissioner was not competent, or relevant, or material, or admissible, to show the cash value, or the market value, of said merchandise, or of any thereof, and was all secondary and hearsay, and not the best evidence of the market value, or the cash value, of the merchandise, either sound or damaged.

"Eighth. Because the testimony of Abraham Haas produced before and received and considered by, and reported by, said commissioner did not, and does not, show, or tend to show, the extent or amount, of damage, if any, to said merchandise, or to any thereof, and the same, and all thereof, was inadmissible, incompetent, secondary, and hearsay.

335 "Ninth. Because the testimony of E. W. Newhall produced before and received and considered by, and reported by, said commissioner was not, and is not, competent, or relevant, or material, or admissible, to show the market value of, or the cash value of, or the damage to, said merchandise, or any thereof, at any time, either sound or damaged; and such testimony was not the best evidence to prove damage to, or the value of, such merchandise, either sound or damaged.

"Tenth. Because said Abraham Haas was not a competent witness to testify to any fact relating to value of, or to damage to, said merchandise, or any thereof.

"Eleventh. Because said E. W. Newhall was not a competent witness to testify to any fact relating to the value of, or to the damage to, said merchandise, or any thereof.

"Twelfth. Because said commissioner hath found and reported that damages in the sum of $9,015.04 had been sustained by Hellman, Haas & Co., when there is no evidence reported by him to sustain such finding and report.

"Thirteenth. Because said commissioner hath not found and reported in favor of claimant, that is, that no claim for damage has been sustained, upon the stipulation of the contract set forth in the libel, as follows: 'It is expressly agreed that all claims against the P. C. S. S. Co. * * * for damage to or loss of any of the within merchandise must be presented to the company within thirty days

336 from date hereof * * * and the lapse of said thirty days shall be deemed a conclusive bar and release of all right to recover against said company * * * for any such damage or loss.'"

XXXIX.

The court erred in confirming the report of the commissioner J. S. Manley, in favor of Bancroft-Whitney Co., a corporation, made and filed herein on the 13th day of September, 1897, and in overruling each of the following exceptions of claimant thereto, to wit:

"First. Because said commissioner hath found and reported, that damages in the sum of $200 have been sustained by Bancroft-Whitney Co.

"Second. Because said commissioner hath not found and reported in favor of claimant, that is, that no claim for damage has been

sustained, upon the stipulation of the contract set forth in the libel, as follows: 'It is expressly agreed that all claims against the P. C. S. S. Co. * * * for damage to or loss of any of the within merchandise must be presented to the company within thirty days from date hereof, * * * and the lapse of said thirty days shall be deemed a conclusive bar and release of all right to recove against said company * * * for any such damage or loss.'"

XL.

The commissioner J. S. Manley, erred in receiving in evidence, over the objection of claimant interposed thereto as specified in his report filed herein on the 13th day of September, 1897, the testimony of Abraham Haas, as to the cost of said goods, as showing or tending to show the "cash value" of such goods at the port of shipment at the date of shipment, and in considering such evidence and in finding thereon that the market value of the goods was the sum testified to by said Abraham Haas.

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XLI.

The court erred in confirming the ruling, and the finding, of the commissioner, J. S. Manley, in the particulars last aforesaid.

XLII.

The commissioner, J. S. Manley, erred in receiving in evidence, over the objection of claimant interposed thereto, as specified in his report filed herein on the 13th day of September, 1897, the testimony of E. W. Newhall, relating to the sale by him of said goods of A. Haas & others, as showing, or tending to show, the extent of the damage to said goods, and in considering such evidence and in finding thereon that the value of the said goods, in their then condition, was the net sum realized from their sale as testified by said Newhall.

XLIII.

The court erred in confirming the ruling, and the finding, of the commissioner, J. S. Manley, in the particulars last aforesaid.

XLIV.

The finding and report of said commissioner, J. S. Manley, that the market value of the merchandise of A. Haas and others, or of Hellman, Haas & Co., was the sum of $10,205.13 was and is immaterial and outside the issues in the libel of said A. Haas and others tendered, and is error; and the consideration of said finding and report by the court, and its judgment in favor of said A. Haas and others, based thereon, was and is, and is here assigned as, error.

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XLV.

The finding and report of the commissioner, J. S. Manley, that the damage to said goods of A. Haas and others—Hellman, Haas & Co.—was the difference between the market value of the same as

found and reported by him, and the price realized from their sale at auction, as testified by E. W. Newhall, and found by said commissioner, and that the damage to said goods was the difference between those sums, and that claimant, or the steamer "Queen," is liable in damages to said A. Haas and others in the sum of such difference, was and is error, in view of the stipulation of the contract "that in settlement of any claim for loss or damage to any of the within goods, said claim shall be restricted to the cash value of such goods at the port of shipment at the date of shipment."

And appellant here assigns such finding last aforesaid as error.

XLVI.

The court thereafter, and over the exception of claimant thereto, confirmed the finding of said commissioner last aforesaid.

And appellant here assigns the confirmation thereof by the court as error.

339 XLVII.

The court erred in rendering and entering a final decree herein in favor of A. Haas and others in the sum of $9,044.84, and costs to be taxed, or in any sum.

XLVIII.

The court erred in rendering and entering a final decree herein in favor of Bancroft-Whitney Co. in the sum of $200.66, and costs to be taxed, or in any sum.

XLIX.

The court erred in adjudging that said decree in favor of A. Haas and others should bear interest.

L.

The court erred in adjudging that said decree in favor of Bancroft-Whitney Company should bear interest.

Wherefore, appellant prays the judgment of the United States circuit court of appeals for the ninth circuit in the premises, that the decrees appealed from be reversed, and that it recover its costs herein incurred.

GEO. W. TOWLE, JR.,
Proctor for Claimant, Appellant.

(Endorsed): Service of the within and receipt of a copy admitted this 14th day of May, 1898. Milton Andros, proctor for appellees. Filed May 14th, 1898. Geo. E. Morse, clerk, by J. S. Manley, deputy clerk.

340 *Order Allowing Appeal.*

Bancroft-Whitney Company.

At a stated term of the district court of the United States of America for the northern district of California, held at the court-

room in the city and county of San Francisco, on Saturday, the 14th day of May, A. D. 1898.

Present: The Honorable John J. De Haven, judge.

BANCROFT-WHITNEY CO. ET AL.
vs.
THE STEAMSHIP "QUEEN OF THE PACIFIC," ETC. } No. 10301.

On motion of Geo. W. Towle, Jr., Esq., proctor for claimant in the above-entitled action, it is hereby ordered that the Pacific Coast Steamship Company, claimant, be and it is hereby allowed to appeal from the final decree of this court, made and entered on the 6th day of May, 1898, in favor of the libelant Bancroft-Whitney Company to the United States circuit court of appeals for the ninth circuit; and on reading and filing the stipulation of Milton Andros, Esq., proctor for libelants, consenting thereto, it is ordered that the supersedeas bond upon the appeal of claimant herein be, and the same is hereby fixed in the sum of $100.00.

341 *Order Allowing Appeal.*

Hellman, Haas & Company.

At a stated term of the district court of the United States of America for the northern district of California, held at the court-room in the city and county of San Francisco, on Saturday, the 14th day of May, A. D. 1898.

Present: The Honorable John J. De Haven, judge.

BANCROFT-WHITNEY COMPANY and Others, Joint Libelants; A. Haas, J. Baruch, and H. W. Hellman, Surviving Partners of the Firm of Hellman, Haas & Company, Libelants,
vs.
THE STEAMSHIP "QUEEN OF THE PACIFIC," ETC. } No. 10301.

On motion of Geo. W. Towle, Jr., Esq., proctor for claimant in the above-entitled action, it is hereby ordered that said Pacific Coast Steamship Company, claimant, be, and it is hereby allowed to appeal from the final decree of this court made and entered on the 6th day of May, 1898, in favor of the libelants A. Haas, J. Baruch and H. W. Hellman, surviving partners of the firm of Hellman,
342 Haas & Company, to the United States circuit court of appeals for the ninth circuit. And on reading and filing the stipulation of Milton Andros, Esq., proctor for libelants, consenting thereto, it is ordered that the supersedeas bond upon the appeal of claimant herein be, and the same is hereby fixed in the sum of $1,000.00.

Notice of Appeal.

Bancroft-Whitney Company.

In the District Court of the United States of America for the Northern District of California. In Admiralty.

BANCROFT-WHITNEY COMPANY and Others, Joint Libelants,
vs.
STEAMSHIP "QUEEN OF THE PACIFIC," ETC., PACIFIC COAST Steamship Company, Claimant.

SIR: Claimant, Pacific Coast Steamship Company, a corporation, appeals from the final decree of the court in this cause in
343 favor of Bancroft-Whitney Company, libelant, to the next United States circuit court of appeals for the ninth circuit.

Dated, May 14th, 1898.

To George E. Morse, Esq., clerk United States district court, northern district of California, and

To Milton Andros, Esq., proctor for libelant.

GEO. W. TOWLE, JR.,
Proctor for Claimant and Appellant.

(Endorsed:) Service of the within notice and receipt of a copy admitted this 14th day of May, 1898. Milton Andros, proctor for appellees. Filed May 14, 1898. Geo. E. Morse, clerk, by J. S. Manley, deputy clerk.

344 *Notice of Appeal.*

In the District Court of the United States of America for the Northern District of California. In Admiralty.

Hellman, Haas & Company.

BANCROFT-WHITNEY COMPANY and Others, Joint Libelants; A. Haas, J. Baruch, and H. W. Hellman, Surviving Partners of the Firm of Hellman, Haas & Company, Libelants,
vs.
STEAMSHIP "QUEEN OF THE PACIFIC," ETC., PACIFIC COAST Steamship Company, Claimant.

SIR: Claimant, Pacific Coast Steamship Company, a corporation, appeals from the final decree of the court in this cause in favor of A. Haas, J. Baruch and H. W. Hellman, surviving partners of the firm of Hellman, Haas & Company, libelants, to the next United States circuit court of appeals for the ninth circuit.

Dated, May 14th, 1898.

345 To Geo. E. Morse, Esq., clerk United States district court, northern district of California, and to Milton Andros, Esq., proctor for libelants.

GEO. W. TOWLE, JR.,
Proctor for Claimant and Appellant.

(Endorsed:) Service of the within notice and receipt of a copy admitted this 14th day of May, 1898. Milton Andros, proctor for appellees. Filed May 14, 1898. Geo. E. Morse, clerk, by J. S. Manley, deputy clerk.

Citation.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Bancroft-Whitney Company (a corporation), Greeting:

You are hereby cited and admonished to be and appear at a United States circuit court of appeals, for the ninth circuit, to be holden at the city of San Francisco in the State of California, on the 13th day of June, 1898, pursuant to an order allowing an appeal duly entered and of record in the clerk's office of the district court of the United States, for the nor. district of California, wherein Pacific Coast Steamship Company (a corporation), claimant, is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

346 Witness the Honorable John J. De Haven, judge of the United States district court for the northern district of California, this 14th day of May, A. D. 1898.

JOHN J. DE HAVEN,
U. S. District Judge.

(Endorsed:) No. 10301. U. S. circuit court of appeals for the ninth circuit. Bancroft-Whitney Co. *et al. vs.* S. S. "Queen of the Pacific," etc. Citation. Filed May 14, 1898. Geo. E. Morse, clerk, by J. S. Manley, deputy clerk.

Service of the within citation is hereby admitted this 14th day of May, 1898.

MILTON ANDROS,
Proctor for Appellees.

Citation.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to A. Haas, J. Baruch, and H. W. Hellman, surviving partners of the firm of Hellman, Haas & Company, Greeting:

You are hereby cited and admonished to be and appear at United States circuit court of appeals, for the ninth circuit, to be holden at the city of San Francisco, in the State of California, on the 13th day of June, 1898, pursuant to an order allowing an appeal duly entered and of record in the clerk's office of the district court of the United States, for the nor. district of California, wherein

347 The Pacific Coast Steamship Company (a corporation), claimant, is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant

as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John J. De Haven, judge of the United States district court for the northern district of California, this fourteenth day of May, A. D. 1898.

JOHN J. DE HAVEN,
U. S. District Judge.

(Endorsed:) No. 10301. U. S. district court for the ninth circuit. Bancroft-Whitney Co. *et al. vs.* S. S. "Queen of the Pacific." Citation. Filed May 14, 1898. Geo. E. Morse, clerk, by J. S. Manley, deputy clerk.

Service of the within citation is hereby admitted this fourteenth day of May, 1898.

MILTON ANDROS,
Proctor for Appellees.

Stipulation for Record.

(Style of Court and Title of Cause.)

It is hereby stipulated and consented that the record on appeal to the United States circuit court of appeals for the ninth circuit, in the above-entitled proceedings, upon the appeals of Pacific Coast Steamship Company, claimant, shall consist of copies of the following portions of the record in the district court, to wit:

1. The libels of Bancroft-Whitney Company, a corporation.
348 2. The libels of A. Haas and others, surviving partners of the firm of Hellman, Haas & Co.
3. The monition issued under date April 28, 1892, with the indorsement thereon.
4. The monition issued under date May 4, 1892, with the indorsements thereon.
5. The exceptions of claimant to the several libels aforesaid.
6. The admiralty stipulations for costs, for value, and for release of the vessel, with the stipulations of counsel relating thereto.
7. The order overruling claimant's exceptions to said several libels.
8. The answer of claimant to the libels of Bancroft-Whitney Co., without the verification by, or the signature of, claimant.
9. The answer of claimant to the libels of A. Haas and others, surviving partners of Hellman, Haas & Co., without the verification by, or the signature of, claimant.
10. Testimony on behalf of libelants.
11. Order overruling claimant's motion for a nonsuit.
12. Testimony on behalf of claimant.
13. Interlocutory decrees.
14. Reports of commissioner.
15. Exceptions of claimant to reports of commissioner.
16. Order overruling exceptions to reports of commissioner, and confirming such reports.

17. Final decrees.
18. All opinions in the case.
19. All papers, and all bonds, and all orders, and the citations, upon appeal, with the indorsements thereon.

349 It is further stipulated that the original exhibits in the case, when not attached and made a part of the pleadings, shall be transmitted to the appellate court, and that copies thereof shall not be inserted in the record.

It is further stipulated that copies of no other parts, or portions, of the record in the above-entitled proceedings, in the district court, shall be made a part, or portion, of the record therein on appeal.

Dated this twentieth day of May, 1898.

MILTON ANDROS,
Proctor for Appellees.
GEO. W. TOWLE, JR.,
Proctor for Appellant.

(Endorsed:) Filed May 20, 1898. Geo. E. Morse, clerk, by J. S. Manley, deputy clerk.

Clerk's Certificate to Record.

UNITED STATES OF AMERICA, } ss:
Northern District of California, }

I, George E. Morse, clerk of the district court of the United States, for the northern district of California, do hereby certify that the foregoing and hereunto annexed three hundred and twelve pages, numbered from 1 to 312, inclusive, contain a full, true, and correct transcript of the record in said district court in the cause entitled "Bancroft-Whitney Company and others, joint libelants, A. Haas, J. Baruch and H. W. Hellman, surviving partners of the

350 firm of Hellman, Haas & Company, libelants, *vs.* Steamship 'Queen of the Pacific,' etc., Pacific Coast Steamship Company, claimant," No. 10301, made up pursuant to rule 52 of the rules of the Supreme Court of the United States. I further certify that the cost of said record, amounting to $189.00, has been paid by appellant.

Witness my hand and seal of said court of San Francisco, this eleventh day of June, A. D. 1898.

[SEAL.] GEO. E. MORSE, *Clerk.*

(Endorsed:) No. 454. In the United States circuit court of appeals for the ninth circuit. Pacific Coast Steamship Company (a corporation), claimant and appellant, *v.* Bancroft-Whitney Company (a corporation); A. Haas, J. Baruch and H. W. Hellman, surviving partners of the firm of Hellman, Haas & Company, libelants and appellees. Transcript of record. Appeal from the district court of the United States for the northern district of California. Filed June 13, 1898. Frank D. Monckton, clerk, by Meredith Sawyer, deputy clerk.

351 In the United States Circuit Court of Appeals for the Ninth Circuit.

PACIFIC COAST STEAMSHIP COMPANY (a Corporation), Claimant and Appellant,
vs.
BANCROFT-WHITNEY COMPANY (a Corporation), A. HAAS, J. Baruch, and H. W. Hellman, Surviving Partners of the Firm of Hellman, Haas & Company, Libelants and Appellees. } No. 454.

Opinion U. S. Circuit Court of Appeals.

Appeal from the district court of the United States for the northern district of California.

This is a libel *in rem*, by shippers of goods shipped on board the steamer "Queen of the Pacific," belonging to the claimants herein to recover damages for breach of contract of affreightment. There was a large number of libels filed which, being of the same nature, were consolidated; the respective proctors agreed to select two cases—that of Bancroft-Whitney Co., and Hellman, Haas & Co., for trial, as it was believed they would fairly present all the questions of law and fact that might arise in the other cases, the disposition of the others to be subject to subsequent arrangement after the final decision herein.

352 The libelants aver in substance that on or about the twenty-eighth day of April, 1888, the goods alleged to have been damaged were shipped in apparent good order and condition on board the steamship "Queen," at the port of San Francisco, for transportation to the port of San Diego, California, there to be delivered in like good order and condition; that at said time the Pacific Coast Steamship Company, claimant herein, entered into a contract of affreightment with libelants for the delivery of the goods, certain perils in said agreement excepted; that the "Queen" sailed for San Diego with said merchandise on board; that, notwithstanding said contract of affreightment, said merchandise was not delivered to libelants at said port, or at any other place, in like good order as received, "but, on the contrary, said merchandise was returned to said port of San Francisco in a greatly damaged condition by reason of having been wet with sea water during said voyage, which, by reason of the negligence of said steamship company, its officers and servants, gained access to the interior of said ship where said merchandise was stowed, to wit, on or about the thirtieth day of April, A. D. 1888;" that said steamship is now in the northern district of California; that in consequence of the injury and damage to said merchandise the libelants have sustained damage, etc.

Exceptions were filed to the libels, by the claimant of the vessel, which were overruled by the court. (The Queen of the Pacific, 61 Fed., 213.)

The claimant then filed answers to the libels. The answers

admit that the said merchandise was received on board the
353 "Queen" and was not delivered at San Diego; that it was returned to San Francisco, and was damaged by reason of having been wet with sea water; but denies "that the same was so wet with sea water during said voyage or by reason of the negligence of said steamship company, its officers and servants, or either of them; and denies that by reason of such, or any such, negligence, sea water or any water gained access to the interior of said ship where said merchandise was stowed," or at any time or at all; denies that at the time the libels were filed the said steamship was in the northern district of California; and avers that for four days prior thereto and continuously thereafter the said ship was without the northern district of California; denies all damages. And, for a further and separate answer and defense, the claimant alleges "that said steamship 'Queen of the Pacific' was, when she sailed from said port of San Francisco, as in said libel alleged, stout, staunch, strong, and in every respect seaworthy, and in such condition sailed from said port of San Francisco, fully and completely manned, officered, and equipped for her intended voyage, and with merchandise or freight, and a large number of * * * passengers on board of her; that she left * * * San Francisco at about the hour of 2 o'clock p. m. of April 29, 1888, * * *; that no unusual incident was known to occur during said twenty-ninth of April, 1888; that about 1 o'clock a. m. of the thirtieth of April, said steamship was noticed to have a slight list to starboard; that efforts were then made to correct such list by shifting freight to port in the between-decks and burning coal mostly from the starboard bunkers; that about 2.15 or 2.30 o'clock a. m. of Monday,
354 April 30, 1888, water was discovered to be dropping from a point in the iron bulkhead on the starboard side of the engine-room and about six (6) or eight (8) inches above the deck of the alleyway in the between-decks of the vessel; that an examination then made resulted in water being found in the between-decks of the steamship aft, such water extending about half way from the side of the ship to the hatch coamings, but the aperture through which such water entered the vessel could not, after diligent search for the same, be discovered; that seamen were put to work passing such water down the hatches into the hold, so as to bring it within reach of the bilge pumps, and such pumps were kept in operation, notwithstanding which the water steadily increased between-decks, and the list of the vessel became so great that about the hour of 5 o'clock a. m. it was deemed by the master of said vessel prudent to make for Port Harford with all convenient speed, which was done, and the said vessel, at about the hour of 7 o'clock a. m. of said thirtieth day of April, 1888, was run upon the beach at said Port Harford, at which place sea water immediately came in over her deck, and nearly filled the vessel with water, and thereby said merchandise became wet with sea water; that the beaching of said steamship was necessary to prevent and avoid a total loss of said steamship and of all the said merchandise then on board of her, and was done by the master thereof as the result of cool delibera-

tion, and in the exercise of a wise discretion on his part as to what was best to be done, and with the purpose of saving said vessel and cargo, and of rendering entirely safe the lives of all the persons, passengers and crew, two hundred and twelve in number, then on
355 board of said steamship; that the said Pacific Coast Steamship Company, owner of said steamship, did at all times, and immediately prior to the sailing of said steamship from the said port of San Francisco with such merchandise on board of her, exercise due diligence to make the said steamship in all respects seaworthy and properly manned, equipped, and supplied, for her then intended voyage, to wit, a voyage to San Diego and way ports, and return; that the crew of said steamship was composed during the times referred to of persons competent to discharge the duties pertaining to their several stations on board said vessel;" that said merchandise was delivered to, received and carried by, the claimant under and in pursuance of the laws of the State of California, and the provisions of a special contract made by the libelant and the claimant; and that said merchandise was damaged, if at all, in said State.

And for a still further and separate defense claimant alleges that the libels are barred by the laches of the libelant, in the prosecution of the same, by the terms of contract alleged in said libel which reads as follows: "It is expressly agreed that all claims against the P. C. S. S. Co., or any of the stockholders of said company, for damages to, or loss of any of the within merchandise must be presented to the company within thirty days from date hereof, and that after thirty days from date hereof, no action, suit or proceeding in any court of justice, shall be brought against said P. C. S. S. Co., or any of the stockholders thereof, for any damage to, or loss of, said merchandise; and the lapse of said thirty days shall be deemed
356 a conclusive bar and release of all right to recover against said company, or any of the stockholders thereof, for any such damage or loss;" that *liabilities* did not present, or cause to be presented to said company within such thirty days its claim for the damages or any part thereof, as in said libel alleged, nor was this, or any, proceeding commenced in any court within said thirty days, nor at any time prior to the twenty-eighth of April, 1892, at which time said steamship was not within the northern district of California, nor was said steamship seized by the marshal under process until the fourth of May, 1892; that the libels are barred by the provisions of section- 337 and 338 of the Code of Civil Procedure of the State of California; that the same are barred by laches on the part of libelant by delay in the prosecution of the same for such length of time as constitutes and is a bar to a recovery thereof in a court of admiralty.

Under the issues as thus presented, the proctor for libelants at the trial contented himself with introducing the shipping receipts as evidence of the apparent good order and condition of the goods when delivered to the carrier for shipment, and after offering some testimony as to the damaged state of the shipment of Hellman, Haas & Co., rested their case. Thereupon claimant moved for a judgment in his favor, which was overruled by the court (The Queen

of the Pacific, 75 Fed., 74); and then the complainant introduced evidence in support of the averments in the answer. This evidence did not disclose the cause of the leak nor the exact locality where the water gained access to the vessel. The court upon the final hearing rendered a decree in favor of libelants (The Queen, 78 Fed., 155).

357 George W. Towle, Jr., for appellant.
Milton Andros, for appellees.

Before Gilbert and Ross, circuit judges, and Hawley, district judge.

HAWLEY, *District Judge* (after stating the facts):

The libel of each libelant is *in rem* against the steamer "Queen of the Pacific," owned by the claimant, to recover damages for a breach of contract of affreightment, for the safe delivery of certain merchandise in apparent good order and condition at the port of San Diego. There are two libels, but in the discussion we shall mainly refer to but one, and the "Queen of the Pacific" will be mentioned as the "Queen."

By a reference to the pleadings it will be observed that there are numerous preliminary questions as to the right of the libelant to recover. These will first be discussed.

First. It is argued by the appellant that the libelant having failed to prove that the steamer "Queen" was within the northern district of California at the time the libel was filed, the court had no jurisdiction to enter any decree. This question rests upon the averments in the libel that the steamer was within the district, and the averment in the answer of the claimant that it was not. It is claimed that no evidence was offered in support of these averments and that the burden of proof was upon the libelant to make proof in regard thereto. The learned judge who tried this case, in his opinion, stated that there was some evidence to the effect that the steamer was within the district at that time. But be that as it may,

358 we are of opinion that its presence or absence at that time, in the light of the other facts, to which we shall refer, is wholly immaterial in order to confer jurisdiction. Conceding that no jurisdiction can be conferred in such a case until there is a seizure made within the limits of the territorial jurisdiction of the court, it does not follow that the steamer must be within such limits at the time the libel is filed. The court acquires its jurisdiction over an action upon a maritime contract of affreightment by the filing of the libel. It obtains jurisdiction over the *res* by a seizure of the steamer made at that time, or thereafter, within the district.

The facts are that the monition was first returned not served, the steamer being without the jurisdiction of the court; an alias monition was thereafter issued and returned served within the district. The court having jurisdiction of the subject-matter obtained jurisdiction over the *res* when it was attached by the marshal upon the alias monition.

The jurisdiction of the court over the cause of action is different from its jurisdiction over the person, or over the *res*. The jurisdic-

tion acquired in the first case is obtained by service of process on the person, and, in the second, by a seizure of the *res*. After the libel is filed, and process issued thereon, the court cannot proceed until in the one case the person has been served or appears, and in the other until there is an actual seizure of the *res*.

In Cooper *v.* Reynolds, 10 Wall., 308, 316, the court said: "By jurisdiction over the subject-matter is meant the nature of the cause of action and of the relief sought; and this is conferred by the sovereign authority which organizes the court, and is to be sought
359 for in the general nature of its powers, or in authority specially conferred. Jurisdiction of the person is obtained by the service of process, or by the voluntary appearance of the party in the progress of the cause. Jurisdiction of the *res* is obtained by a seizure under process of the court whereby it is held to abide such order as the court may make concerning it. The power to render the decree or judgment which the court may undertake to make in the particular cause depends upon the nature and extent of the authority vested in it by law in regard to the subject-matter of the cause."

There are numerous cases where process *in rem*, has been issued by a Federal court where the *res* was within the hands of a State court of co-ordinate jurisdiction. In such cases the Federal court refused to dismiss the libel, but postponed action thereon until the proceedings in such court of co-ordinate jurisdiction were terminated.

The E. L. Cain, 45 Fed., 367;
Moran *v.* Sturges, 154 U. S., 256, 279;
In re Chetwood, 165 U. S., 443, 460;
In re Johnson, 167 U. S., 120, 125.

It must be admitted that in such cases the *res* is as much without the jurisdiction of the Federal court as if it were without the district.

The objection to the jurisdiction of the court is not well founded.

Second. The appellant claims that the proceedings against the "Queen" *in rem* are, in substance and effect, a proceeding against the Pacific Coast Steamship Company, within the true intent
360 and meaning of the special contract set out in the pleadings, and that the claimant is released by the thirty-day clause of the special contract.

This contention cannot be sustained. As a general rule it may be conceded that a proceeding *in rem* cannot be maintained against an offending steamer where there is no liability upon the part of the owner of the steamer to pay the libelant's claim. But the libelant is not compelled to proceed directly against the owner. He may enforce his lien against the steamer. There is a clear distinction between the two proceedings. A proceeding *in rem* is to enforce a lien against the offending steamer irrespective of the ownership of it, and no personal judgment can be entered against the ship-owner as such. The decree in a proceeding *in rem* is enforced directly against the *res* by a condemnation and sale thereof or against the obligors on the bond that stand in the place of the *res*, and, for the purposes of the judgment, is the *res*. While a proceed-

ing *in personam* is direct against the ship-owner to enforce his personal liability for a debt wholly irrespective of any lien on the ship, growing out of the maritime contract on which the proceeding is founded.

The present proceeding is not against the claimant company, or its stockholders, to enforce the payment of a debt, but it is to foreclose a lien against a steamer in which they claim an interest. The fact that the company appears and interposes a claim to the steamer does not change the legal nature of the proceeding, from one *in rem* to one *in personam*, so as to bring it within the terms of the special contract on the back of the bill of lading which are to be *contra proferentes*.

361 In Leon *v.* Galceran, 11 Wall., 185, 189, where a writ of sequestration had been issued under the laws of the State of Louisiana against a vessel to enforce the payment of the seamen's wages, the court said: "Neither the writ of sequestration nor the process of attachment is a proceeding *in rem*, as known and practiced in the admiralty, nor do they bear any analogy whatever to such a proceeding, as a suit in all such cases is a suit against the owner of the property and not against the property as an offending thing, as in case where the libel is *in rem* in the admiralty court to enforce a maritime lien in the property."

The contract relied upon by appellant is in the nature of a statute of limitations, prohibiting after the lapse of a certain period the bringing of any suit or proceeding, against the Pacific Coast Steamship Company, or against any of its stockholders, to recover damages for loss or injury to the merchandise specified in the bill of lading. It will be observed that nothing is said in the contract against the right of the shipper to enforce any lien against the ship

Is it not fair to presume that, if the steamship company intended to include in this limitation a proceeding *in rem* against its steamship, it would have expressed this intention in language unambiguous, clear, definite, and certain? The fact that it has not done so is to be construed most strongly against it.

The rule of strict construction is always applied to such exceptions. Conditions in policies of insurance furnish the true rule upon this subject. The courts have universally held that as

362 the insurance company prepares the contract and embodies in it such conditions as it deems proper, it is in duty bound to use language, in the various provisions of the policy, in such a manner that the insured cannot be mistaken or misled as to the duties and burdens thereby imposed, and in case of any doubt or uncertainty as to the meaning of the words, or of inconsistent or contradictory provisions in the policy, they are to be construed most strongly against the company.

Palmer *v.* Warren Ins. Co., 1 Story, 360, Fed. Case No. 10698.
Steel *v.* Phenix Ins. Co., 51 Fed., 715, 722, and authorities there cited.

In the Caledonia, 157 U. S., 124, 137, the court said: "As the exceptions were introduced by the ship-owners themselves in their own favor, they are to be construed most strongly against them."

We are of opinion that the thirty-day clause in the bill of lading has no application to this proceeding; but even if it could be held that the limitation clause in the contract was applicable, it would not constitute a bar, because the limitation of time therein specified is unreasonable. Admitting that a common carrier of goods has a right to adopt rules fixing the time within which the shipper must present his claim, or bring his action for damages, it does not follow that this is an arbitrary right or that the clause in the bill of lading in the present case is reasonable. The date of the bill of lading is the date when the goods were received. The carrier might in transporting the goods meet with unavoidable accidents, or delay, in delivering the same at the port designated,
363 and might thereafter lose or damage the goods. The amount of the damage, if only partial, could not, probably, be ascertained for several days, or weeks, depending upon the special circumstances of the case, and it would be unjust and unreasonable to limit the time of instituting proceedings from the date the goods were received. The limitation ought, in justice and fairness to all parties concerned, be limited, at least, from the time when the loss or damage occurred. If not, to the time when the shipper had knowledge thereof, and a reasonable time thereafter should be given within which the claim must be presented or action brought thereon.

The appellees are not estopped from enforcing this rule of construction against the steamship company. As was said in Liverpool Steam Co. *v.* Phœnix Ins. Co., 129 U. S., 397, 441: "The carrier and his customer do not stand upon a footing of equality. The individual customer has no real freedom of choice. He cannot afford to higgle or stand out and seek redress in the courts. He prefers rather to accept any bill of lading, or to sign any paper that the carrier presents; and in most cases he has no alternative but to do this, or to abandon his business. Special contracts between the carrier and the customer, the terms of which are just and reasonable, and not contrary to public policy, are upheld; such as those exempting a carrier from responsibility for losses happening from accident, or from dangers of navigation that no human skill or diligence can guard against. * * * But the law does not allow a public carrier to abandon altogether his obligations to the public, and to stipulate for exemptions which are unreason-
364 able and improper, amounting to an abnegation of the essential duties of his employment."

In Pacific Express Co. *v.* Darnell, 6 S. W., 765, 766, a limitation clause of sixty days from the time when the bill of lading was given was held to be unreasonable. The court, in discussing this question, said: "Any reasonable limitation contained in the bill of lading would be upheld by the court. But it has been decided by this court that an unreasonable restriction is not valid, even in cases to which our statute does not apply."

Railroad Co. *v.* Harris, 67 Tex., 166.

Is this a reasonable limitation? We think not. If it had been stipulated that a claim should be made in sixty days from the ascertainment of the loss, the case would have been different. But to require a shipper to give notice of his claims within a short period of the date of the bill of lading, without reference to the time when a loss for the breach of the contract accrued, is to impose a restriction which in many cases would deny a right of action, and thereby permit the carrier to contract against his negligence, which is never allowed.

Third. The questions raised by appellant as to the applicability and effect of the sections of the Code of Civil Procedure, and statute of limitations, and the alleged laches of the libelant in the diligent prosecution of his claim will be considered together.

The fact that the bill of lading was signed within the State of California, before the goods were shipped on board the "Queen," and that the freight was to be delivered at a port within the State, does not bring the contract within the provisions of the statutes of California.

365 The libelants did not bring this suit to enforce any lien given by the State statute; and hence the provisions of section 813 of the Code of Civil Procedure of California, relative to the time of bringing actions against steamers, vessels, and boats, which declares that "such liens only continue in force for the period of one year from the time the cause of action accrued," as well as the other provisions of the code, cited by counsel, have no application. The libels were brought under and by virtue of the maritime laws of the United States. In the exercise of their admiralty and maritime jurisdiction the United States courts are governed solely by the legislation of Congress and the general principles of maritime law, and are not bound by State statutes.

New Zealand Ins. Co. *v.* Ermmoor S. Co., 79 Fed., 368;
Willard *v.* Dorr, 3 Mason, 91; Fed. Case No. 17679;
Brown *v.* Jones, 2 Gall., 477, 481; Fed. Case No. 2017;
The Key City, 14 Wall., 653.

In the J. E. Rumbell, 148 U. S., 1, 12, the court said: "The admiralty and maritime jurisdiction is conferred on the courts of the United States by the Constitution, and cannot be enlarged or restricted by the legislation of a State. No State legislation, therefore, can bring within the admiralty jurisdiction of the national courts a subject not maritime in its nature."

The Glide, 167 U. S., 606, 622.

366 The question of laches, however, is applicable to courts of admiralty, and should be governed by the general principles of equity in regard thereto. No general principle of equity is better settled than the one which declares that a party must not be permitted to sleep over his rights to the prejudice of the party against whom he makes a claim, who, by the delay, may be deprived of the evidence and means of effectively defending himself. But the question as to what is to be considered a reasonable time has not

been, and cannot be, settled by any precise or definite rule that would be applicable to all kinds and classes of cases. The proper solution of the question depends, to a great extent, upon the facts and circumstances of each particular case. What would be laches in one case might not constitute laches in another where the facts are different. Mere lapse of time is not always the true criterion to follow, although it often constitutes an important factor. State statutes of limitations are often adopted by analogy. But in some cases courts have held a party guilty of laches for failure to bring his suit within a reasonable time, although the statute of limitations has not expired. Others have declined to dismiss the suit on the ground of laches, even where not brought within the time required by analogy of the statutes of limitation at law. The court in determining the question must necessarily be governed by the exercise of its sound legal discretion with special reference to the facts.

In the Key City, 14 Wall., 653, 659, Mr. Justice Miller, in delivering the opinion of the court, said: "The authorities on the subject of lapse of time as a defense to suits for the enforcement of
367 maritime liens are carefully and industriously collected in the briefs of counsel on both sides, to which reference is hereby made, without specifying them more particularly. We think that the following propositions as applicable to the case before us may be fairly stated as the result of these authorities.

First. That while the courts of admiralty are not governed in such cases by any statutes of limitation, they adopt the principle that laches or delay in the judicial enforcement of maritime liens will, under proper circumstances, constitute a valid defense.

Second. That no arbitrary or fixed period of time has been, or will be, established as an inflexible rule, but that the delay which will defeat such a suit must, in every case, depend upon the peculiar equitable circumstances of that case.

Third. That where the lien is to be enforced to the detriment of a purchaser for value, without notice of the lien, the defense will be held valid under a shorter time, and a more rigid scrutiny of the circumstances of the delay than when the claimant is the owner at the time the lien accrued."

In Southard *v.* Brady, 36 Fed., 560, the court said: "It is true that there is no statute of limitation in admiralty; but courts of admiralty, like those of equity, will not lend their aid to enforce stale demands. Exceptional circumstances will sometimes lead a court of admiralty to pronounce a claim stale after a lapse of time less than the local statutory period of limitations. Where there is nothing exceptional in the case the court will govern itself by the analogy of the common-law limitations."

Bailey *v.* Sundberg, 49 Fed., 583, 586.

368 The Code of Civil Procedure of California limits the time for the commencement of actions as follows: "Sec. 337. Within four years an action upon any contract, obligation, or liability, founded upon an instrument in writing, executed in this

State." This proceeding was instituted on the last day of that period of time. There are no facts or circumstances which indicate that by reason of the delay appellant has been prejudiced in any of its legal rights or prevented in any manner from making any defense that it could have made if there had been no such delay. No witnesses were absent by whom the facts could be established. In brief, there were no difficulties encountered in the path of having a fair trial. There are no special or exceptional facts or circumstances, which so often appeal to the conscience of the courts in such cases that would in equity justify us in holding these libelants guilty of such laches as to deprive them of their right to maintain their libels because of their delay in instituting the proceedings herein.

Fourth. The special contracts provide that: "It is understood that in the settlement of any claim for loss of, or damage to, any of the above-mentioned goods, said claim shall be restricted to the cash value of such goods at the port of shipment at the date of shipment."

Appellant objects to the methods pursued by the libelants in making the proofs on this point both as to the cash value and of the depreciation of value on account of the damages. The objections are purely technical. There is no showing or pretense that the result reached is erroneous. The damaged goods were sold at public auction, and it is claimed that such a sale does not represent
369 the true market value of the damaged goods. Why not? No showing is made by appellant that any greater value could have been obtained at private sale, or that the public auction was not fairly conducted. What was the use of going through the formula and expense of having the goods appraised? The same objections could, perhaps, have been urged with as much or greater force against an appraisement, as against a public auction after due and timely notice.

In the Columbus, 1 Abb. Ad., 37, Fed. Case No. 3041, Betts, judge, said: "Sale by auction is in the great marts of commerce so commonly resorted to by merchants to ascertain the value of deteriorated merchandise that it may almost amount to a usage of trade. It furnishes, cheaply and promptly, all the accuracy which can be expected in any known measure of damages, and it is peculiarly fitting, in cases of this character, that the court should sanction and sustain it as the method best adapted to protect the interests of all parties concerned."

In the Columbus, 1 Abb. Ad., 97, Fed. Case No. 3042, the same judge said: "To all reasonable intents, this method of fixing the amount of injury or loss is just as obligatory on him and the vessel, as a submission to arbitration, or an adjustment by mutual agreement between the parties. It does not appear that any witness, knowing the condition of the goods, considered the sale prices at all below their marketable value. The sale at auction, under such circumstances, was properly admissible as evidence of the value of the goods when landed."

The objections made upon these points were properly overruled.

370 Fifth. It is claimed by appellant that the court erred in allowing the witness Haas, when testifying as to the cost of the goods, to refresh his memory from a memorandum marked "Merchandise on steamer 'Queen,'" which the witness said was the bill, or a copy of it, which was handed to the agents of the steamer of the goods shipped on the "Queen." The facts in relation to this memorandum, as shown by the testimony, are as follows:

"By Mr. ANDROS:

Q. Do you know what goods were shipped on board of her?
A. I know by the bills.
Q. Please to state—refresh your memory from that paper and state what they were.

Mr. TOWLE: I object to any testimony from that paper.

Mr. ANDROS:

Q. In whose handwriting is that?
A. This is in the handwriting of a clerk of ours, who was with us then, and who is with us now in Los Angeles.

The COURT:

Q. Do you know anything about that paper yourself?
A. Nothing more than I told the young man to make it out at the time. He made it under my supervision.

Mr. ANDROS:

Q. I will ask you to see, as I read this, whether it corresponds with what is on the back of the bill of lading. * * *

Mr. TOWLE: We object to that as irrelevant, immaterial, and incompetent, whether it agrees with the memorandum or not.

371 Mr. ANDROS: I propose to prove the cost price of these goods by Mr. Haas, and I want to simply identify these goods, by that memorandum, so that he may testify as to the cost.

Mr. TOWLE: So far as it has a bearing upon the question of price, if the witness proposes to testify from that memorandum as to prices, we shall object to that. We object to these questions. If the witness is to testify, he can as well testify from the items on the bill of lading as from the memorandum which agrees with those items.

The COURT: His memorandum probably has the prices attached.
Mr. ANDROS: Yes, sir.

Q. Fifty cases of canned vegetables; what was the price of this, Mr. Haas?

Mr. TOWLE: Are you testifying from your memorandum or from your own knowledge?

A. I am testifying from the memorandum.

Mr. ANDROS:

Q. Did you at the time know the cost of these goods?
A. Yes, sir.
Q. Did you buy them?
A. Yes, sir.
Q. Bought them yourself here?
A. Either bought them myself, or they were bought under my supervision.
Q. So at that time you did know what they cost?
A. Yes, sir.
Q. Did you subsequently instruct that memorandum of that cost to be made?
A. Yes, sir.
Q. At the time that you made that memorandum yourself or had it made under your supervision, were the figures therein mentioned the true cost of those goods?
A. Yes, sir.

372 Mr. TOWLE: We ask that that answer be stricken out. * * * We submit that the only memorandum that can be used is one made by himself at the time. * * *

The COURT: Or under his d[illegible]ion.

The WITNESS: It was our book-[illegible]per.

Mr. TOWLE: But he directs somebody to make up a memorandum and that paper and presents them to him; that does not authorize him to testify from it.

The COURT: He goes further than that; he said he knew it to be correct. * * *

The COURT: I understand you to say that you knew that the charges there were correct at the time?

A. Yes, sir."

We have made this quotation because it shows, as clearly as any words we might express, that the objections made by appellant are absolutely untenable. The law is well settled that a witness may be permitted to refresh his memory by the use of any written memorandum although it is not made by himself, if he saw it while the facts therein stated were fresh in his recollection and knew that the memorandum, as then made, was correct.

1 Green. on Ev. (15th ed.), secs. 436, 437.
Commonwealth *v.* Ford, 130 Mass., 64, 66, and authorities there cited.
Huff *v.* Bennett, 6 New York, 337, 339.
Jones on Ev., sec. 880, and authorities there cited.
Anchor M. Co. *v.* Walsh, 108 Mo., 277, 284.

373 Sixth. Appellant argues with reference to the libel of the surviving partners of the firm of Hellman, Haas & Co., that if the loss sustained by them was paid by the Magdeburg General Insurance Co. prior to the dissolution by the death of Jacob Haas, one of its members, that the surviving members have no authority to sue, because their authority was limited to a settle-

ment of the partnership affairs as provided by sections 2458–2462 of the Civil Code of California. The contention is that, under such conditions, the insurer having paid the loss and thereby become subrogated to the partnership rights, during the lifetime of Jacob Haas, had the right to sue in the partnership name so long as the partnership existed; but that it could not sue, as it did in this case, in the name of the surviving partners. This contention cannot be sustained upon reason or authority.

In Liverpool and Great Western Steam Co. *v.* Phenix Ins. Co., 129 U. S., 397, 462, where the libel was filed by the insurance company, the court said: "The question of the subrogation of the libelant to the rights of the shippers against the carrier presents no serious difficulty. From the very nature of the contract of insurance as a contract of indemnity, the insurer, upon paying to the assured the amount of a loss, total or partial, of the goods insured, becomes, without any formal assignment, or any express stipulation to that effect in the policy, subrogated in a corresponding amount to the assured's right of action against the carrier or other person responsible for the loss; and in a court of admiralty may assert in his own name that right of a shipper.

The Potomac, 105 U. S., 630, 634.

Phœnix Ins. Co. *v.* Erie Transportation Co., 117 U. S., 312, 321."

374 In Hall *v.* Railway Co., 13 Wall., 367, 370, the court said: "In respect to the ownership of the goods, and the risk incident thereto, the owner and the insurer are considered but one person, having together the beneficial right to the indemnity due from the carrier for a breach of his contract or for non-performance of his legal duty. Standing thus, as the insurer does, practically, in the position of a surety, stipulating that the goods shall not be lost or injured in consequence of the peril insured against, whenever he has indemnified the owner for the loss, he is entitled to all the means of indemnity which the satisfied owner held against the party primarily liable. His right rests upon familiar principles of equity. It is the doctrine of subrogation, dependent not at all upon privity of contract, but worked out through the right of the creditor or owner. Hence it has often been ruled that an insurer who has paid a loss may use the name of the assured in an action to obtain redress from the carrier whose failure of duty caused the loss."

See, also, United States *v.* American Tobacco Co., 166 U. S., 468, 474.

In the face of these authorities it is apparent that the question as to who shall bring the suit is one to be determined between the shippers and the insurance company. It is no concern of the appellant whether the libel is brought in the name of the shippers or in the name of the insurance company. In either event the right of the claimant in its defense would be identical.

If the insurance company became subrogated to the right of the

partnership, during the lifetime of all the partners, the
375 death of one, subsequent to the loss, and its payment by the insurance company, would not prevent it from recovering from the carrier for the damage sustained to the goods. The insurance company had the right at its election to use the name of the surviving partners of the firm in bringing this suit, or to have instituted the suit in its own name. If it were brought for the benefit of the insurance company it stands in law the same as if it were brought in its own name, and its right to maintain the suit cannot be questioned by the claimant.

There are other minor points discussed by counsel which we have examined but do not think necessary to discuss. It is enough to say that they are without merit.

Seventh. It is contended by appellant that no negligence on the part of the ship was proven by appellees; that the presumption of negligence from the goods being wet was overthrown by proof, on the part of appellant, that the steamer was seaworthy when she sailed, and that there was no negligence of the master or crew on the voyage; that these facts, which are not disputed, casts upon the libelants the burden of proving some specific negligence, which they have failed to do; that the libels, while they allege the execution of the contract, are based not upon a breach of contract *per se*, but upon negligence, and negligence only, as the occasion and foundation of the alleged damages.

Upon these points the respective proctors have exhibited great, and commendable, industry in the citation of authorities which it is claimed support their views and have furnished the court with convincing evidence of their skill, ability, and learning, in
376 the arguments which they have elaborately made in their briefs. In the light of their respective contentions it becomes important to first determine the true nature and character of the libels. Whether they are to be construed to be actions upon torts as claimed by appellant, or actions upon contracts, as claimed by appellees. The question is important. But upon a careful examination of all the cases we are of opinion that it is not difficult of solution. There is no apparent conflict in the authorities cited. The differences which, at first blush, might seem to exist, are, upon close examination, found to be based upon different facts as to the allegations contained in the libels; some refer to common-law actions, others to proceedings in admiralty; some are cases of collision, and others upon contracts for affreightment. Discretion, judgment, and patient consideration must be brought to bear in order to determine which are applicable, and which are not, to the pleadings and facts in the present case. We have, in the statement of facts, copied the averments in the libels. They need not be repeated. It is essential to bear in mind that proceedings in admiralty are not the same as in the courts of the common law. As was said by Mr. Justice Story in The Schooner Adeline and Cargo, 9 Cranch, 244, 284: "No proceedings can be more unlike those than in the courts of common law and in the admiralty."

In actions at common law the pleadings are to be construed

strongly against the pleader, and often strictly, without regard to the real substance of the action; but in admiralty the rule is different. All courts of admiralty agree in regarding substance as of more importance than form, in the proceedings which come
377 before it, and, therefore, any process in admiralty is, in general, if not always, sufficient, which distinctly brings the substance of a case and the actual parties before a proper court, in such way as to permit the questions of the case to be investigated, its merits ascertained, and justice done.

2 Parsons Ad., 369.

The criticism of appellant is based upon the language in the libel: "That in consequence of the injury and damage to said merchandise by sea water * * * the libelant has sustained damages." And he argues that while the libels, by way of inducement, show a failure to perform the special contracts, they do not claim any damage as resulting therefrom, and that, by the selection of the libelants, the damages alleged are limited to the alleged negligence of the servants of the Pacific Coast Steamship Company in permitting the sea water to flow in upon the goods, and that such averments show that the action is founded upon a tort and not upon a contract, and that if there was no negligence the libelant cannot recover any damages. We are unable to agree with the views thus expressed. On the other hand, we are of opinion that the proceeding is founded upon the contract of affreightment, and that the claim for damages is based upon the failure of the steamship company to deliver the merchandise in good order and condition, and that the averments in the pleadings as to the negligence are merely illustrative of the manner in which the goods were damaged. It cannot, it seems to us, be legally said that the mere mention of the word "negligence," as used in the pleadings, changes the
378 character of the proceeding from one on a contract to one in tort. If there is an express contract, and the act complained of is a breach of it, the action is clearly founded on a contract. The libelants had the privilege of selecting the form of the proceeding, whether in tort, or upon the contract, and having elected to rely upon the contract, they are entitled to all the rights and privileges pertaining thereto.

The authorities cited by appellant in the collision cases, and cases at common law, are not, in our opinion, applicable to this case. The other cases do not sustain his position.

In Legge *v.* Tucker, 1 Hurl. and Nor., 500, which is referred to with approbation by the court in At. and Pac. R. R., 164 U. S., 393, 398, the action was in form an action on the case for the negligence of the livery-stable keeper in the care and custody of a horse, and it was held that the foundation of the action was a contract, and that in whatever way the declaration was formed it was an action of assumpsit.

Pollock, C. B., said: "Where the foundation of the action is a contract, in whatever way the declaration is framed, it is an action of assumpsit."

Watson, B., said: "The action is clearly founded on contract. Formerly, in actions against carriers, the custom of the realm was set out in the declaration. Here a contract is stated by way of inducement, and the true question is, whether, if that were struck out, any ground of action would remain.

Williamson *v.* Allison, 2 East, 452.

379 There is no duty independently of the contract, and therefore it is an action of assumpsit."

In Baylis *v.* Lintott, 8 C. P. L. R., 345, the action was against a carriage proprietor for not securely carrying certain luggage belonging to a person who had hired his carriage. The declaration alleged that in consideration that the plaintiff with her luggage, would become a passenger in such carriage, the defendant promised to carry the plaintiff and her luggage safely, but did not safely carry the plaintiff's luggage, but so carelessly and negligently conducted himself that part of said luggage was lost. The court held that the cause of action set forth in the declaration was "founded on a contract."

In Flemming *v.* Manchester S. & L. R'y, 4 Q. B. Div. (L. R.), 81, 83, the material parts of the statement of claim were (1) that the plaintiffs delivered to the defendants, as common carriers of goods for hire, a parcel of goods of the plaintiffs, to be carried by the defendants from Sheffield to Dundee for reward to the defendants; (2) that the defendants, as such common carriers as aforesaid, accepted the said parcel of goods, to be by them taken care of and safely and securely carried and delivered to the plaintiffs at Dundee; (3) that the defendants did not take care of, and safely and securely carry and deliver to the plaintiffs the said parcel of goods, but not regarding their duty in that behalf, so carelessly and negligently conducted themselves with respect thereto that the said parcel of goods was and is wholly lost. The court said: "The question is, whether the plaintiffs are entitled to costs in an action, in which they have recovered a sum not exceeding 20 l.; and in

380 which they charge the defendants as common carriers. According to Bryant *v.* Herbert, 3 C. P. D., 389, we have to determine whether the action 'is founded on contract, or 'on a tort,' and whether we are to decide this question by looking at the form of the pleadings or at the facts, it is clear that this action is 'founded on contract.' * * * These allegations seem, in effect, to amount to a charge, that in consideration of the payment of hire the defendants promised to carry safely the plaintiff's goods; and this would clearly have been under the old forms of pleading a declaration in contract."

The law upon this subject is well expressed in Schouler, Bail. & Carr., p. 557, as follows: "Concerning the form of action: This, at common law, may be *ex delicto* or *ex contractu*. So long as the common-carriage occupation was considered simply as a public duty, its breach was deemed tortious, and the carrier suable in an action on the case founded upon the custom of the realm; but when contract began to assuage the rigor of public policy, it became established,

that the carrier should be held liable in assumpsit on his undertaking; and hence the modern usage to lay hold of the advantages of the action *ex contractu*, while preserving those likewise of that more ancient remedy against carriers, *ex delicto*, which the practice of earlier centuries commended. Where the transaction and the character of the loss require the plaintiff to show a contract, express or implied, with the carrier, to support his action, contract is the true remedy; otherwise, the preferable form of action is tort."

In a proceeding of this character, and under the facts es-
381 tablished in this case, the following principles of law are well settled: (1.) That common carriers by water, like common carriers by land, are in the nature of insurers, and are liable for every loss or damage, however occasioned, unless it happens from the act of God, or the public enemy, or by the act of the shipper, or from some other cause or accident expressly excepted in the bill of lading.

Propeller Niagara *v.* Cordes, 21 How., 7, 22, 26.

In Hall *v.* Railway Co., 13 Wall., 367, 372, the court said: "When a loss occurs, unless caused by the act of God, or of a public enemy, he is always in fault. The law raises against him a conclusive presumption of misconduct, or breach of duty, in relation to every loss not caused by excepted perils. Even if innocent, in fact, he has consented by his contract to be dealt with as if he were not so."

Second. That where merchandise is shipped and the usual bill of laden given promising to deliver the same in good order, the dangers of the sea excepted, and they are found to be damaged, the *onus probandi* is upon the owner of the vessel to show that the injury was occasioned by one of the excepted causes.

Rich *v.* Lambert, 12 How., 347, 357;
Nelson *v.* Woodruff, 1 Black, 156, 169;
The Majestic, 166 U. S., 375, 386, and authorities there cited;
The Lydian Monarch, 23 Fed., 298;
The Mascotte, 51 Fed., 605;
The Compta, 4 Saw., 375, 377;
Hunt *v.* The Cleveland, 6 McLean, 76; Fed. Case No. 6885;
382 Angell on Carriers, sec. 202;
Chitty on Carriers, 142*;
Lawson on Carriers, secs. 245, 247.

Third. That in every contract for the carriage of goods by sea, there is a warranty on the part of the ship-owner that the ship is seaworthy at the time of beginning her voyage, and his undertaking to safely carry the goods cannot be discharged because the want of fitness in the steamer is the result of latent defects.

The Caledonia, 43 Fed., 681, 685;
Work *v.* Leathers, 97 U. S., 379;
The Edwin I. Morrison, 153 U. S., 199, 210;
The Caledonia, 157 U. S., 124, 130.

Fourth. That although it may be presumed that a vessel is seaworthy when she sails, if soon thereafter a leak is found without the ship having encountered a peril sufficient to account for it, the presumption is that she was not seaworthy when she sailed.

Higgie *v.* Am. Lloyds, 14 Fed., 143, 147;
The Gulnare, 42 Fed., 861;
Work *v.* Leathers, 97 U. S., 379;
The Planter, 2 Woods, 490; Fed. Case No. 11207*a*;
Cort *v.* Delaware Ins. Co., 2 Wash. C. C., 375: Fed. Case No. 3257;
Walsh *v.* Washington Ins. Co., 32 N. Y., 427, 436.

Appellant contends that the stranding of the "Queen" is the *causa proxima* of the damage, and was a sea peril within the
383 meaning of the special contracts relieving the "Queen" from all liability for damage resulting from "dangers of the sea," and that upon the established facts "that a thoroughly seaworthy vessel, without negligence on the part of her crew, springs a leak twelve hours after she sails, she not having, so far as is shown, encountered anything unusual upon the voyage—what is the presumption relating to the leak? Was it the result of accident? Was it the result of a sea peril? That it must be presumed to have resulted from the one or the other seems evident."

We are of opinion that the stranding of the ship at Port Harford was only incidental in causing the damage. The steamer was run to the beach, not because of high winds, or boisterous weather, or any danger of the sea; but from the fact that a leak had been discovered which could not be controlled. The fact, if it be the fact, that the merchandise was not wet with sea water until the steamer stranded at the beach is wholly immaterial; it was the leak in the steamer that was the cause of the damage, and the real and only question necessary to be discussed is, whether that leak was occasioned by a peril of the sea, or came within any of the exceptions mentioned in the shipping receipt; or, if the cause of the leak is not shown, then, upon the presumptions which the law raises as to the burden of proof; and we shall confine our discussion to those points.

The argument on behalf of appellant is based upon the erroneous theory that its obligation to libelants was discharged when it
384 introduced evidence at the trial that the "Queen" was an absolutely seaworthy steamer when she sailed; and was properly manned, officered, and equipped on her voyage; and that appellant was not guilty of any negligence in the use of the steamer, or the handling of the goods.

In order to overcome the *prima facie* case, made by the libelants, so as to relieve itself from all responsibility, the law imposed upon appellant the burden of establishing that the damage to the goods was occasioned by some of the exceptions mentioned in the shipping receipt; and, in this respect, it has failed to meet the requirements of the law.

What are the facts? The libelants simply introduced their ship-

ping receipts as evidence of the apparent good order and condition of the merchandise when delivered to the steamship company, the damaged condition of the goods when returned to San Francisco, and that the goods were then of less value than when shipped. Appellant then introduced evidence which tended to support the averments in its answer as to the absolute seaworthiness of the "Queen" when she sailed; the competency of her master, officers and crew, the fact of a leak being discovered about eleven hours after the "Queen" sailed from San Francisco; that every attempt was made, consistent with prudent navigation and good seamanship, to discover the aperture or place through which the water entered the steamer, and the circumstances of her being compelled to put into Port Harford, and her being there beached substantially as alleged in claimant's answer. The evidence shows that the leak was on the starboard side of the vessel and was first discovered by the water-
385 tender, who noticed a small amount of water on the floor of the engine-room in a place that should have been dry; it was dropping from a point in the iron bulkhead on the starboard side of the engine-room, a few inches above the deck of the alleyway, in the between-decks of the vessel, coming from a water-tight compartment on the starboard side. This condition of affairs was immediately reported to the captain, and prompt measures were at once taken to ascertain the precise locality and cause of the leak, and to arrest its progress. But all of the efforts of the officers and crew in this direction proved ineffectual, and the captain then, in the exercise of a wise discretion, as alleged in the answer and shown by his testimony, ran the steamer upon the beach at Port Harford. The evidence is as dumb as an oyster as to the cause of the leak. There is no evidence that the "Queen," after she sailed from the port of San Francisco, met with any accident or injury, or tempestuous winds or boisterous weather, which would have caused the leak. The captain, it is true, stated that they had some boisterous weather, but upon his cross-examination admitted that it was only the ordinary weather, usually met with and to be expected at that season of the year. There was no evidence tending to show that the leak could be rationally attributed to any accident or injury produced by the state of the weather then prevailing.

From this brief, but substantial, review of the testimony, it is apparent that the real and efficient cause of the leak is not disclosed by the evidence. It does not affirmatively appear that the cause of the leak was not within the knowledge of the claimant. It is
386 true that in appellant's brief it is said, "the cause of the aperture has not been explained nor does it appear that it was within the power of any one to explain it." Again, appellant says: "Claimant showed the fact of the leak, and that it did not know—could not know—what cause it was that had produced it." We have been unable to find any testimony in the record that supports these statements. But, on the contrary, the record shows that pending the examination of Captain Alexander, of the "Queen," as a witness, the court, of its own motion, put to him several questions. Among others, the following:

"Q. I will ask you another question to which there may be an objection by counsel, and you need not answer it until I determine the objection. After the 'Queen of the Pacific' was raised at Port Harford, did you discover the cause of the leak?

Mr. TOWLE: We object to that.

The COURT: What is the ground of your objection?

Mr. TOWLE: The objection is that it is not a part of our case, and is not the theory on which we are trying it, as to what may have been discovered after the vessel had been on the rocks. (After argument.)

The COURT: I appreciate the fact that you are trying the case very carefully and on a very narrow margin. I think for the time being, I will sustain Mr. Towle's objection to the question put by the court.

Mr. TOWLE: I would like your honor to withdraw the question.

Mr. ANDROS: I would prefer that the objection be sustained.

387 The COURT: I do not want anything that the court does to change the theory of the case. I will withdraw the question for the present, and will see what may come hereafter. I do not know what I may do hereafter."

This action upon the part of the claimant is significant. Especially in view of the fact that it appears from the evidence that after the "Queen" was beached at Port Harford, and while she was partially submerged, a diver was sent down to examine her bottom and ascertain what was wrong with the steamer. He stopped the leak. All the bulkhead doors were secured from the inside; a cofferdam was built around the forward hatch; the water was pumped out, and the steamer floated. Forty-eight hours thereafter she returned to San Francisco without any leak occurring on the return voyage, and upon a thorough examination at the Union iron works, on the dry dock, she was found to be in a perfect seaworthy condition. Considering these facts, not alone upon probabilities and conjecture, but in the light of reason, and of the objections that were made to the question asked by the court, is it not fair to presume that the claimant had knowledge of the real cause of the leak, and that its failure to show what the cause was is a strong circumstance tending to show that if the truth had been disclosed it would not have relieved the claimant upon any of the grounds of exemption from liability, in the shipping receipts or bills of lading?

In Gulf, C. & S. F. R'y Co. *v.* Ellis, 54 Fed., 481, 483, the court said: "Now, it is a well-settled rule of evidence that when the circumstances in proof tend to fix a liability on a party who

388 has it in his power to offer evidence of all the facts as they existed, and rebut the inferences which the circumstances in proof tend to establish, and he fails to offer such proof, the natural conclusion is that the proof, if produced, instead of rebutting, would support, the inferences against him, and the jury is justified in acting upon that conclusion. 'It is certainly a maxim,' said Lord Mansfield, 'that all evidence is to be weighed according to the proof

which it was in the power of one side to have produced, and in the power of the other side to have contradicted' (Blatch *v.* Archer, Cowp., 63, 65). It is said by Mr. Starkie in his work on evidence, vol. 1, page 54: 'The conduct of the party in omitting to produce that evidence in elucidation of the subject-matter in dispute which is within his power, and which rests peculiarly within his own knowledge, frequently affords occasion for presumptions against him, since it raises strong suspicion that such evidence, if adduced, would operate to his prejudice.'"

We are of opinion that the court, notwithstanding the objection of Mr. Towle, would have been justified in requiring the witness to answer the question, even if it were not in precise harmony with the theory upon which the parties were proceeding in the case. Why not? If it were within the power of the court to ascertain the truth why should it be withheld or suppressed, because the proctors desired to burden the court with the legal presumptions arising from the failure to show a fact which, if shown, would make the solution of the question, as to how the case should be decided, easy and plain? The court ought not to have been compelled to decide the case upon the presumptions of law until it was
389 affirmatively shown that the claimant could not, after diligent search, introduce any evidence as to what caused the leak.

Why should the court be required to indulge in presumptions, of its own motion, as to the cause of the leak, and then be criticised for so doing, when the appellant carefully, cautiously, and designedly, refrained from shedding any light thereon, or offering any evidence in regard thereto, assigning as the reason therefor, that such facts would be inconsistent with the theory upon which the case was being tried? If appellant had introduced any testimony that it had tried to ascertain the cause of the leak, and had been unable so to do, that would, perhaps, have introduced another theory, but if Captain Alexander had been allowed, or compelled, to answer the question asked by the court, and the examination continued on this new theory, the presumptions are that the truth as to the cause of the leak would have been discovered, and the case would have then been decided upon the facts instead of presumptions.

In the Ship Compta, 4 Saw., 375, Fed. Case No. 3069, which is cited and relied upon by both parties, and which, in several respects, bears a close analogy to the case in hand, the court said: "This action is brought to recover damages for injuries to goods shipped on board the above vessel and consigned to libelants under various bills of lading, which are appended to the bill. At the hearing, the shipment of the goods and their delivery in a damaged condition were admitted. It was also admitted that the damage was by sea water. The burden of proof was thus cast upon the carrier to show that the damage was occasioned by one of those causes
390 from the effects of which he is exempted from the terms of the bill of lading, or by the general rules of law."

After stating that the defense set up in the answer was perils of the sea, and that the contention of the defendant was that the ship

encountered such violent gales and heavy seas "as to strain and damage her, thereby causing her decks to leak and admit water to the cargo," and the facts in relation thereto, the court further said: "It may, I think, reasonably be concluded that the weather experienced by the vessel was such as might, possibly, have produced, on a staunch and seaworthy ship, the effects attributed to it by the claimants. But that it was not of such unusual and extreme severity as to justify the assumption, without further evidence that it caused the leaks which occasioned the damage. The carrier, to make good his defense, is bound to show that the damage arose from a sea peril. It is not enough for him to show that it might have arisen from that cause. He must prove that it did. This proof can be afforded either by showing a sea peril of such a character that injury to the vessel, however staunch and seaworthy, would be its natural and necessary consequence; or, by the direct testimony of those who observed its effect upon the ship; or, by proving her condition on her arrival; or, he may exclude every other hypothesis of causation, by satisfactory proof that she was tight, staunch, and seaworthy at the commencement of the voyage."

The broad statement is clearly made that it is the duty of the owner, in order to relieve himself "to show that the damage arose
from a sea peril." It necessarily follows that if such facts
391 are known to him he must prove them. "It is not enough
for him to show that it might have arisen from that cause. He must prove that it did." If the facts are unknown to him then the other methods of proof, suggested by Judge Hoffman, may be resorted to. Their sufficiency, of course, to be determined by the court.

Common sense and sound reason appeal strongly, to the conscience of the court, against the adoption of any rule that would allow the claimant to withhold the facts, within his knowledge, and rely solely on the theory of presumptions.

In the Edwin I. Morrison, 153 U. S., 199, 210, the vessel was bound from Weymouth, Mass., to Savannah, Georgia, and her cargo was damaged by reason of the loss of the cap covering the bilge-pump hole, and it was alleged that this pump had not been properly screwed down, but negligently and improperly fastened and left insecure by those in charge of the steamer. The defense was that it was displaced by a peril of the sea. The district court entered a decree in favor of the libelant, which was reversed by the circuit court. The supreme court reversed the decision of the circuit court and affirmed that of the district court. It appeared in that case that, almost immediately after the commencement of the voyage, the steamer encountered a storm of unprecedented violence, from the effects of which she took in eighteen inches of water, which came in contact with the cargo and soaked it to some extent. The court said: "Assuming, as we must, that the damages awarded by
the district court resulted from the loss of the cap and plate
392 covering the bilge-pump hole, the question to be determined
is whether that loss was occasioned by a peril of the sea or by the condition of that covering as it was when the vessel entered

upon her voyage. If through some defect or weakness the plate and cap and the screws which secured it came off, or if the cap and plate were so made or so fastened as to be liable to be knocked off by any ordinary blows from objects washed by the sea across the decks, then the vessel was not seaworthy in that respect, and the loss could not be held to come within the exception of perils of the sea, although the vessel encountered adverse winds and heavy weather. * * * The obligation rested on the owners to make such inspection as would ascertain that the cap and plates were secure. Their warranty that the vessel was seaworthy in fact did not depend on their knowledge or ignorance, their care or diligence."

Upon all the evidence contained in the record, we are of opinion that the court did not err in its conclusion that the burden of proof rested upon the claimant to show that the leak, which was the direct cause which led to the damage of the goods, by sea water, occurred by the danger of the sea, and that in the absence of any such proof the presumption of the law is that the damage was occasioned either from the unseaworthiness of the steamer, or from the carelessness or negligence of the officers and crew on board. In either event the claimant and the steamer would be liable.

The decree of the district court is affirmed with costs.

(Endorsed:) Opinion. Filed Feb. 6, 1899. F. D. Monckton, clerk.

393 United States Circuit Court of Appeals for the Ninth Circuit, October Term, 1898.

THE PACIFIC COAST STEAMSHIP COMPANY (a Corporation), Appellant,
v.
THE BANCROFT-WHITNEY COMPANY (a Corporation), A. Haas, J. Baruch, and H. W. Hellman, Surviving Partners of the Firm of Hellman, Haas & Company, Appellees. } No. 454.

Decree U. S. Circuit Court of Appeals.

Appeal from the district court of the United States for the northern district of California.

This cause came on to be heard on the transcript of the record from the district court of the United States for the northern district of California, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this court that the decree of the said district court, in this cause be, and the same is hereby, affirmed, with costs and interest.*

(*Amended so as to carry interest, by order of court of March 2, 1899. F. D. M., clerk.)

394 (Endorsed:) Decree. Filed Feb. 6, 1899. F. D. Monckton, clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

THE PACIFIC COAST STEAMSHIP COMPANY (a Corporation), Appellant,
v.
THE BANCROFT-WHITNEY COMPANY (a Corporation), A. Haas, J. Baruch, and H. W. Hellman, Surviving Partners of the Firm of Hellman, Haas & Company, Appellees. } No. 454.

Certificate Clerk U. S. Circuit Court of Appeals.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing three hundred and ninety-four (394) pages, numbered from one to three hundred and ninety-four (394), inclusive, to be a copy of the printed record and of the opinion and decree filed in the above-entitled cause, in said United States circuit court of appeals for the ninth circuit, as the originals thereof appear of record in my office.

395 Attest my hand and the seal of said United States circuit court of appeals for the ninth circuit, at San Francisco, California, this twenty-ninth day of August, A. D. 1899.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

{ Ten-cent U. S. internal-revenue stamp, canceled Aug. 31, '99. F. D. M., clerk. }

396 [Endorsed:] File No., 17,508. U. S. circuit court of appeals, 9th circuit. Term No., 130. Pacific Coast Steamship Company, petitioner, *vs.* The Bancroft-Whitney Company and A. Haas, J. Baruch, & H. W. Hellman, surviving partners of the firm of Hellman, Haas & Company. Filed September 8, 1899.

397 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the ninth circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which Pacific Coast Steamship Company is appellant and Bancroft-Whitney Company and A. Haas, J. Baruch, and H. W. Hellman, surviving partners of the firm of Hellman, Haas & Company, are appellees, which suit was removed into the said circuit court of appeals by virtue of an appeal from the district court of the United States for the northern district of California, and we being willing for certain reasons that the said cause and the record and proceedings

therein should be certified by the said circuit court of appeals
398 and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 16th day of October, in the year of our Lord one thousand eight hundred and ninety-nine.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

399 [Endorsed:] No. 454. C. C. A. Supreme Court of the United States. No. 394. October term, 1899. Pacific Coast Steamship Company *vs.* Bancroft-Whitney Co. *et al.* Writ of certiorari. Filed October 24, 1899. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

400 In the Supreme Court of the United States.

PACIFIC COAST STEAMSHIP COMPANY, a Corporation, Appellant, *vs.* BANCROFT-WHITNEY COMPANY, a Corporation, *et al.*, Appellees.	No. 394. October Term, 1899.

It is hereby stipulated by and between appellant and its proctor and appellees and their proctor that the above-entitled proceeding may be heard in said Supreme Court upon the printed transcript of the proceedings therein heretofore filed in said Supreme Court by Pacific Coast Steamship Company in connection with its petition for a writ of certiorari to the United States circuit court of appeals for the ninth circuit, which petition was granted on, to wit, the 16th day of October, 1899.

Dated this 24th day of October, 1899.

MILTON ANDROS,
Proctor for Bancroft-Whitney Company and for A. Haas, J. Baruch, and H. W. Hellman, Surviving Partners of the Firm of Hellman, Haas & Co., Appellees.

GEO. W. TOWLE, JR.,
Proctor for Pacific Coast Steamship Company, Appellant.

(Endorsed:) Stipulation for record in Supreme Court. Filed October 24, 1899. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

401 United States Circuit Court of Appeals for the Ninth Circuit.

PACIFIC COAST STEAMSHIP COMPANY (a Corporation), Appellant,
vs.
BANCROFT-WHITNEY COMPANY (a Corporation) and A. Haas, J. Baruch, and H. W. Hellman, Surviving Partners of the Firm of Hellman, Haas & Company, Appellees. } No. 454.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the next preceding page to be a full, true, and correct copy of a stipulation entered into between the attorneys of record for the several parties in the above-entitled cause on the 24th day of October, A. D. 1899, as the original thereof remains and appears on file in my office.

Seal United States Circuit Court of Appeals, Ninth Circuit.

Attest my hand and the seal of said United States circuit court of appeals for the ninth circuit, at San Francisco, California, this 24th day of October, A. D. 1899.

F. D. MONCKTON, *Clerk.*

[Ten-cent U. S. internal-revenue stamp, canceled Oct. 24, '99, I. R. F. D. M.]

402 United States Circuit Court of Appeals for the Ninth Circuit.

PACIFIC COAST STEAMSHIP COMPANY (a Corporation), Appellant,
vs.
BANCROFT-WHITNEY COMPANY (a Corporation) and A. Haas, J. Baruch, and H. W. Hellman, Surviving Partners of the Firm of Hellman, Haas & Company, Appellees. } No. 454.

Return to Writ of Certiorari.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, in obedience to the foregoing writ of certiorari, issued out of the Supreme Court of the United States and addressed to the honorable judges of the United States circuit court of appeals for the ninth circuit, commanding them to transmit to the said Supreme Court the record and proceedings in the above-entitled cause, do hereby attach to the said writ a certified copy of a stipulation entered into between the attorneys of record for the several parties in said cause on the 24th day of October, A. D. 1899, the original of which stipulation has been this day filed in this court, and do make the same my return to said writ.

Seal United States Circuit Court of Appeals, Ninth Circuit.

In testimony whereof I have hereunto set my hand and affixed the seal of said United States circuit court of appeals for the ninth circuit, at San Francisco, California, this 24th day of October, A. D. 1899.

F. D. MONCKTON,
Clerk United States Circuit Court of Appeals for the Ninth Circuit.

[Ten-cent U. S. internal-revenue stamp, canceled Oct. 24, 1899. F. D. M.]

403 [Endorsed:] Case No. 17,508. Supreme Court U. S., October term, 1900. Term No., 130. Pacific Coast Steamship Co., petitioner, *vs.* The Bancroft-Whitney Co. *et al.* Writ of certiorari and return. Filed Oct. 31, 1899.

No. 304. 130

Petition for Certiorari. 304

FILED
SEP 8 1899
JAMES H. MCKENNEY,
Clerk

Filed Sept. 8, 1899.

Supreme Court of the United States

PACIFIC COAST STEAMSHIP COMPANY (A Corporation),

Appellant, and Petitioner, in this Court.

v.

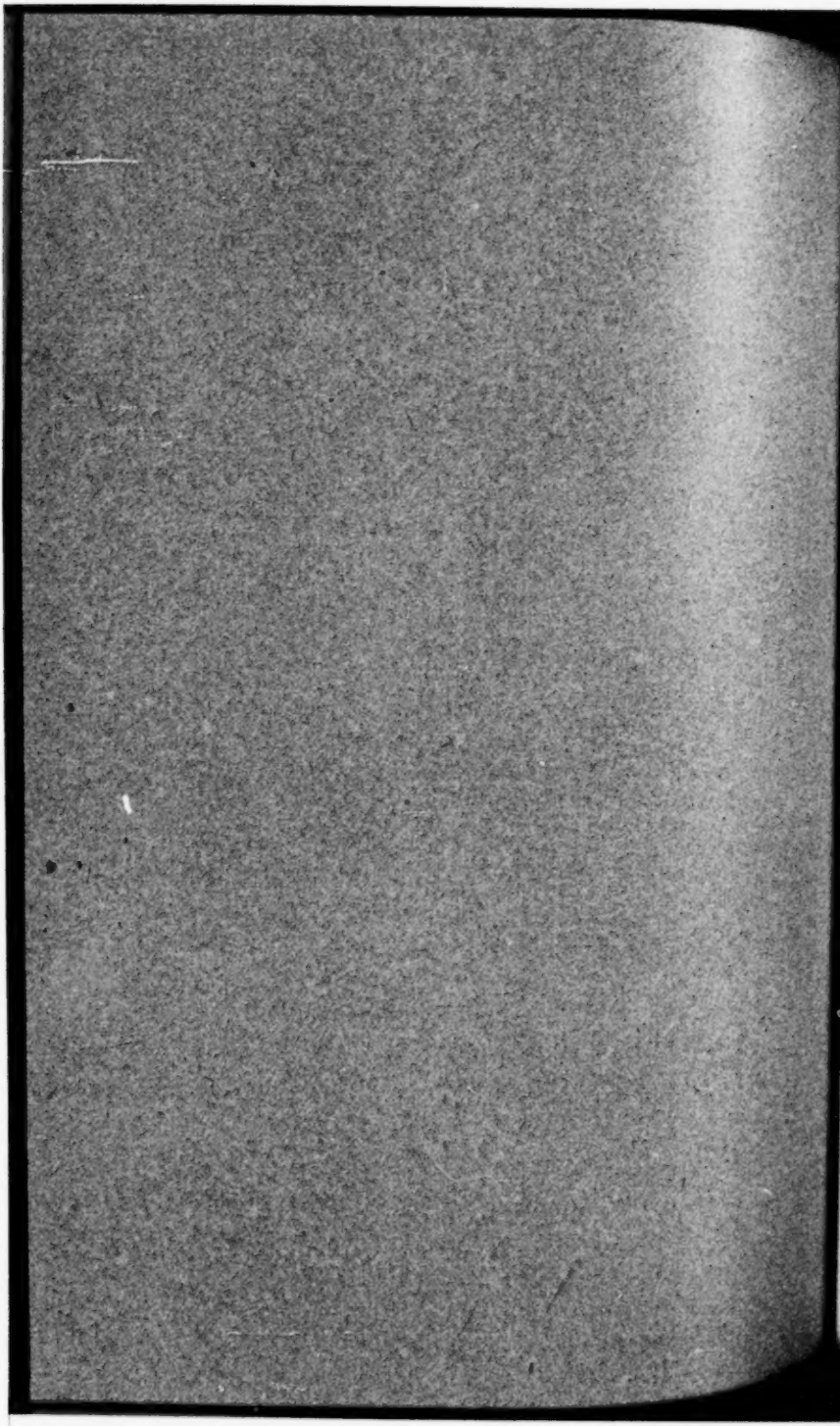
BANCROFT-WHITNEY COMPANY (A Corporation), A. HAAS, J. BARUCH and H. W. HELLMAN, Surviving Partners of the Firm of HELLMAN, HAAS & COMPANY,

Libellants and Appellees.

Petition of Pacific Coast Steamship Company, a Corporation, for a Writ of Certiorari to Review the Judgment of the Circuit Court of Appeals for the Ninth Circuit in the Above Entitled Proceeding.

GEO. W. TOWLE, JR.,

Counsel for Appellant and Petitioner.



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IN THE

Supreme Court of the United States

PACIFIC COAST STEAMSHIP COMPANY (A CORPORATION),
Appellant and Petitioner,
v.
BANCROFT-WHITNEY COMPANY (A CORPORATION), A. HAAS, J. BARUCH AND H. W. HELLMAN, SURVIVING PARTNERS OF THE FIRM OF HELLMAN, HAAS & COMPANY,
Appellees.

Petition of Pacific Coast Steamship Company, a Corporation, for a Writ of Certiorari to Review the Judgment of the Circuit Court of Appeals for the Ninth Circuit in the Above Entitled Proceeding.

To the Honorable the Supreme Court of the United States:

The Petition of Pacific Coast Steamship Company, a corporation, respectfully shows:

That at 2 o'clock in the afternoon of the 29th day of April, 1888, its steamship "Queen of the Pacific," otherwise and hereinafter called "Queen," sailed from the port of San Francisco, in the State of California, on a

voyage to San Diego and intermediate ports in said State, having on board a cargo of general merchandise, and upwards of 200 persons, certain of which merchandise was owned by and consigned to Hellman, Haas & Co., a co-partnership, consisting of A. Haas, J. Baruch, H. W. Hellman, and Jacob Haas (Transcript filed herewith, p. 91), and certain thereof was owned by Bancroft-Whitney Co., a corporation.

That a little more than twelve hours after the "Queen" sailed, that is, at 2.30 o'clock A. M., on April 30, 1888, it was found that water was entering from the sea into a water tight compartment in the between decks section of the vessel, known as the "starboard alleyway;" that compartment being about 100 feet long, by 10 feet wide, and 9 feet high; and then closed at each end by iron bulkheads having therein iron doors which were then closed and fastened with set screws; and at that time the compartment was stowed full of freight. The port side, or wall, of the compartment was the iron bulkhead of the engine room, and it was the discovery of water, intermittently flowing through an aperture in that wall about the size of a ten-penny nail and situate four or five inches above the floor of the "alleyway" and dropping thence onto the floor of the engine room, that first indicated to those on board that anything was wrong with the vessel. Diligent effort was at once made, by the master and crew, to ascertain the place at which the water was entering the vessel, and while it was found that the leak was located in the side of the ship within the area of the "starboard alleyway," its exact location could not be ascertained. Up to the time that the water was

discovered the steamer had had no appreciable list, but within half an hour thereafter she had gradually acquired a list of 6 or 7 degrees to the starboard, and that fact and the constant and rapid increase of the list thereafter, indicated to the master that such an aperture had been caused in the side of the ship that it would not be prudent to open the alleyway doors, and that the safety of all concerned required that the steamer should be stranded upon the beach, which was thereafter done at Port Harford, in said State, the "Queen" then having a list of about thirty (30) degrees to starboard. Upon the vessel being so stranded she nearly filled with water and lay in an entirely helpless condition for three or four days. During that time the services of a diver were procured from San Francisco, and he, after repeated efforts, found the aperture and stopped it, whereupon the water was pumped out of the vessel and she floated and was towed back to San Francisco. On arrival at San Francisco her cargo was all discharged upon the wharf and delivery thereof there tendered to and accepted by the several owners, they first giving their several general average bonds.

The merchandise, delivery of which was so accepted by Hellman, Haas & Co., with which we are here especially concerned, was by them delivered to Newhall Sons & Co., auctioneers, for sale at public auction, and was so sold, for account of Hellman, Haas & Co., on or about the 19th day of May, 1888, and the net proceeds of the sale were paid to that firm, by Newhall Sons & Co., on or about May 28, 1888. The merchandise shipped to domestic coast ports would, ordinarily, be

delivered to the consignee, at destination, within five days from the date that it was received from the shipper.

No claim for damage to such merchandise, or to any thereof, was made upon the owners of the "Queen" prior to the sale, nor were the owners of the "Queen" notified of the intended sale. The merchandise so sold—represented by libelants as consisting of rice, nails, tea, drugs, chowchow, pickles, canned vegetables, oil in bottles, sugar in barrels and half barrels, and currants in barrels, 1,551 packages in all—was, so far as appears, all sold as one lot, without examination of the contents of the packages, or any thereof, being made by any one, or an opportunity for such an examination given to the persons attending the sale. The terms of sale were cash upon delivery, and such delivery to be made before dark of the day of sale. The lump sum for which the goods were so sold was $1,262.20, and the net sum paid to Hellman, Haas & Co. was $1,190.09.

The steamer, after discharging her cargo as aforesaid, was repaired at San Francisco, and thereafter was continuously employed between domestic coast ports, or was lying in San Francisco Bay until she was, under alias process issued in this proceeding on May 4, 1892, seized at said San Francisco on said day; but no claim was made upon her owner, or libel filed against the steamer, for damages in the premises, until the 28th day of April, 1892, four years, lacking two days, from the date that the steamer was stranded at Port Harford, and more than three years and eleven months after the date that the merchandise was so sold for account of Hellman, Haas & Co.

When the libels were filed, or thereafter until the 4th

day of May, 1892, the "Queen" was not within the northern district of California (Transcript, pp. 24–25, and 33).

Each of the libels, after stating that it was "in a cause of contract civil and maritime," and alleging the delivery of the goods to the Pacific Coast Steamship Company for shipment to destination upon the "Queen," and that the same were shipped under a contract of affreightment, in writing, wherein the steamship company "acknowledged to have received said goods *in apparent good order*," and promised to deliver the same, at destination, "in like good order as when received, *certain perils in said agreement mentioned excepted*," and that a copy of said agreement is annexed to the libel "*and made a part hereof*," and that said "Queen" sailed with the goods on board thereof, alleges that "notwithstanding said contract of affreightment * * * said merchandise was not delivered" at destination "or at any other place in like good order as when received, but on the contrary was returned to said port of San Francisco in a greatly damaged condition, *by reason of having been wet with sea water* during said voyage, *which by reason of the negligence* of said steamship company, its officers and servants, *gained access to the interior of said ship where said merchandise was stowed*, to wit, on or about the 30th day of April, A. D. 1888. * * * That in consequence of the injury and damage to said merchandise *by sea water* as in the last preceding article herein is mentioned and set forth the *libelants have sustained damages* in the sum of," in the case of Hellman, Haas & Co., $9,015.24, and in the case of the Ban-

croft-Whitney Co., $455.00. And further alleged "that said steamship is now within the northern district of California," and the premises within the admiralty and maritime jurisdiction of the Court, to wit, the District Court of the United States for the northern district of California, in which said libels were filed. (See pp. 9 to 19 of Transcript.)

The bill of lading for the goods of Hellman, Haas & Co.—made a part of the libel with which we are here principally concerned—contained, among other stipulations, the following:

"Shipped * * * per the Pacific Coast Steamship Company's line of steamers, to be forwarded on the steamer 'Queen' * * * the following property, *in apparent* good order, except as noted, *value, weight, contents and condition of contents being unknown to said company* * * * to be delivered at the vessel's tackle, in like apparent good order and condition, at the port of San Pedro, unto Hellman, Haas & Co., or assigns, * * * subject to the following conditions, which are made a part of this bill of lading: * * * The company shall not be held responsible or accountable for * * * damage arising from * * * accidents to or from machinery, boilers or steam, *or any other accidents or dangers of the seas, rivers, roadsteads or harbors, or of sail or steam navigation, of what nature or kind soever.* The company shall not be liable, or accountable, for the hidden contents of packages, *for weight, leakage, breakage,* shrinkage, *rust,* loss or damage resulting from insecurity of packages * * *. It is agreed that in the settlement of any claim for loss of or damage to any of

the above mentioned goods, *said claim shall be restricted to the cash value of such goods at the port of shipment at the date of shipment.* It is expressly agreed that all claims againt the P. C. S. S. Co., or any of the stockholders of said company, for damage to or loss of any of the within merchandise, must be presented to the company within thirty days from date hereof; and that after thirty days from date hereof, no action, suit or proceeding, in any Court of justice, shall be brought against said P. C. S. S. Co., or any of the stockholders thereof, for any damage to or loss of said merchandise; and the lapse of said thirty days shall be deemed a conclusive bar and release of all right to recover against said company, or any of the stockholders thereof, for any such damage or loss."

And said bill of lading had, indorsed thereon, a specification of the packages of merchandise represented by it, and, in addition thereto, the words "*owner's risk.*" (See Bill of Lading, page 20.)

The other contracts of affreightment were, save as to the words "owner's risk," substantially the same, in their stipulations, as the said bill of lading. (See page 22 of Transcript.)

When the libels were filed, to wit, on the 28th day of April, 1892, a monition was issued thereon and placed in the hands of the marshal for service, by attachment of the "Queen" (Tr., pages 23–4), and the same was on May 3, 1892, returned not served by reason of not finding the "Queen" within the district. (Tr., pp. 24–25.)

On May 4, 1892, an alias monition was issued (Tr.,

pages 25–6), and the "Queen" seized thereunder on that day (Tr., p. 27).

Thereafter, and on the 16th day of May, 1892, your petitioner, as claimant of the "Queen," filed exceptions to said libels (see pages 28–30 of Transcript) upon substantially the following grounds:

First. That the libels show that the libelants have no cause of action against and no lien upon the "Queen."

Second. That the libels show that the causes of action therein stated, if any, were waived and abandoned by virtue of the special provisions of the several contracts pleaded by libelants, to wit, the thirty (30) day clause thereof, long prior to the date said libels were filed.

Third. That said libels show that the demands asserted thereby are stale, neglected and legally abandoned; and are barred by the statutes of limitations of the State of California relating thereto, to wit, Section 337 of the Code of Civil Procedure, which provides a limitation of four (4) years within which to commence an action based upon a breach of an express stipulation of a contract in writing, executed in this State; Subdivision 3 of Section 338 of the same Code, which provides that actions for injuries to personal property must be commenced within three (3) years from the date of the injury; Section 2174, Civil Code, which provides that the obligations of a common carrier may be limited by special contract; Section 2909, Civil Code, which provides that a lien is to be deemed accessory to the act for the performance of which it is a security, and is extinguished in like manner with any other accessory obligation; and Section 2911, Civil Code, which provides that a lien is extinguished by

the lapse of time within which, under the provisions of the Code of Civil Procedure, an action can be brought upon the principal obligation.*

Further, that the Court had not jurisdiction in the matters alleged because said steamship "Queen" was not within the territorial jurisdiction of the Court when the libels were filed.

Further, that the lien upon said "Queen," in the premises, had expired before the "Queen" was brought within the jurisdiction of the Court; and this by reason of the fact that the causes of action stated in the libels accrued, if at all, on April 30, 1888, and the vessel was not seized by the marshal until May 4, 1892, more than four years after the date of the matters complained of.

Upon hearing had the exceptions were each and all overruled; the Court then finding as a fact that the "Queen" was *not* within the district when the libels were filed. (See page 33 of Transcript.)

Thereupon the Pacific Coast Steamship Company filed its answers to said libels, by which it admitted the shipments to have been made under the special contracts relating thereto pleaded by libelants; denied that there had been the negligence alleged in the libels, or any negligence in the premises; admitted that the merchandise was not delivered at the destination stated in said contracts; alleged the misfortune to the "Queen" as hereinabove stated; that the "Queen" was stranded at Port Harford; that such stranding was necessary and

*For a transcript of all the statutes, in this petition referred to, see appendix hereto.

was done by the master of the "Queen" as a measure of prudence and in the interest of all concerned in the safety of the ship and the cargo and the persons on board of her, and that the merchandise was wet as the result of such stranding; that the merchandise was all returned to San Francisco on the "Queen," and there delivered to and accepted by the owners thereof; and denied that libelants had suffered damage in the premises to the extent of the sums stated by them, or to any extent, or at all. Alleged that the "Queen" was in all respects seaworthy when she sailed on said voyage; that she was properly provisioned and supplied and was furnished with a competent master and crew. Further alleged, as a defense, the thirty-day clause of the bill of lading, pleaded by libelants and heretofore set forth; and that no claim had been presented, or suit brought, within such thirty days, or at any time prior to filing the libels herein; that libelants knew of the stranding of the "Queen," and that their merchandise had been wet with sea water as the result thereof, on or prior to the 1st day of May, 1888; that the demands asserted in the libels were barred by Section 337 of the Code of Civil Procedure of the State of California, and by Subdivision 3 of Section 338 of said Code, and by Section 813 of said Code—which latter section provides a limitation of one year for liens upon vessels engaged in carrying goods from one port to another in said State—and by the laches of libelants, in prosecuting the same.

Thereafter the cases above referred to—the same being two only out of more than thirty libels filed against the "Queen" on August 28, 1892, and on subsequent

dates—came on for hearing before the Court, and it was then admitted that if the "Queen" was liable to Bancroft-Whitney Co. at all she was so liable in the sum of two hundred dollars, and no more. There was no admission relating to the claim of Hellman, Haas & Co.

Counsel for Hellman, Haas & Co., or, more accurately, for The Magdeburg General Insurance Company suing in the names of three of the surviving partners of that firm (see pages 15 and 19 of Transcript) to maintain its libel, called a witness who testified that Hellman, Haas & Co. knew of the stranding of the "Queen" as early as May 1, 1888, and that subsequent to that date the witness, a member of that firm, had instructed a clerk in its employ to prepare, from copies of invoices in the possession of that firm, a statement of the *cost* of the goods on board the "Queen." That the witness knew that the statement so prepared was correct, and was for exhibition to an insurance company with which that firm then had an "open policy;" and that the *cost* of the goods to Hellman, Haas & Co., as shown by such statement, was the sum of $10,205.13; that Hellman, Haas & Co. had accepted delivery of the goods, from the "Queen," at San Francisco; and by, another witness, proved that the packages were wet when delivered from the "Queen," and that the nine lots of goods, 1,551 packages in all, were sold at public auction at San Francisco, for account of Hellman, Haas & Co., on the 19th day of May, 1888, for the lump sum of $1,262.20, and that the net sum realized by Hellman, Haas & Co. was $1,190.09; and that such auction sale was advertised for two days in one newspaper. That no examination of the

contents of the packages was made, and that the terms of sale were cash on delivery, and delivery to be made before dark of the day of sale.

The foregoing was all the evidence introduced by libelants to show the contents of the packages, and the condition of the contents thereof when delivered to the "Queen," and to show the alleged negligence and the extent of the damage to the goods; and on that they rested their case.

Claimant, your petitioner, thereupon moved for a judgment in its favor, which was denied.

Thereupon claimant introduced evidence from which the Honorable Judge of the District Court found that the "Queen" was entirely seaworthy when she sailed on the voyage in question, and was properly officered, manned and equipped (Tr., p. 268, 280); that there was no evidence indicating negligence of officers or crew in navigating the vessel (Tr., p. 281); that water had not been flowing very long into the compartment when the leak was discovered (Tr., pp. 283–4); that the testimony rebuts any presumption that a dead light in that compartment could have been opened by any one on the voyage (Tr., p. 284), and that the evidence all tends to show that a dead light in that compartment could not have been open when the "Queen" sailed upon that voyage (Tr., pp. 281–284), and that the water entered the "Queen" through a dead light. The Court further found that the Magdeburg General Insurance Company was the real libelant, and thereupon ordered judgment in favor of libelants, with a reference to a master to ascertain and report the damages sustained (Tr., p. 294).

Thereupon the evidence on behalf of libelants, above referred to, was all re-introduced before the master, and libelants there admitted that no claim for damages to any of the merchandise had ever been made by them until the said libels were filed (Tr., pp. 299–301).

Thereupon the master reported that the *market value* of the said merchandise of Hellman, Hass & Co., at the time of shipment, was the sum of $10,205.13, and that its market value in its damaged condition, when received by libelants at San Francisco, was $1,190.09, the net sum realized from the sale, and that the damage sustained by Hellman, Haas & Co. in the premises was the difference between the two sums, to wit: between the *cost* price and the *sale* price, that is, the sum of $9,015.04 (Tr., pp. 302–303).

To that report claimant filed exceptions upon the grounds, among others, that there was no evidence produced before the master which showed, or tended to show, the *cash value* or the *market value* of the merchandise *at the port of shipment at the date of shipment*, or which would support the finding of the master as to its market value on the day it was shipped; and that no evidence had been introduced before the master which supported his finding that the market value of the merchandise in its damaged condition was the value thereof reported by him, and that there was no evidence to support his finding that libelants had suffered damages in the sum of $9,015.04, or in any other substantial amount (Tr., pp. 304–307).

The exceptions were overruled, and a decree, as recom-

mended by the master, thereupon entered upon his report (Tr., pp. 309–12).

From that decree an appeal was taken to the Circuit Court of Appeals for the Ninth Circuit, and the same was there heard upon the record as made, and upon the evidence introduced in the District Court and before the master, and upon such hearing the decree of the District Court was affirmed.

Thereupon, and at the same term in which its judgment was rendered, a stay of proceedings was duly obtained from the Court of Appeals to enable your petitioner to present this its petition to this Honorable Court.

Petitioner's Contentions.

The contention of your petitioner has at all times been and now is:

First. That neither the District Court, nor the Court of Appeals, had jurisdiction to proceed to a decree against your petitioner upon said libels, it appearing that the "Queen" was not within the northern district of California when the libels were filed.

Second. That the claims against and the liens upon the "Queen," resulting in favor of libelants from the shipment of their goods on board of her, expired, terminated and ended long prior to the date that the "Queen" was seized by the marshal under process issued upon said libels, that is to say:

(*a*) In thirty days from the date of shipment, by virtue of the thirty-day stipulation of the bill of lading; or,

(*b*) In one year from the 30th day of April, 1888, by

virtue of the provisions of Section 815 of the Code of Civil Procedure of the State of California ; or,

(*c*) In three years from the 30th day of April, 1888, by virtue of the provisions of Subdivision 3 of Section 338 of said Code of Civil Procedure ; or

(*d*) At the very latest within four years from the 30th day of April, 1888, by virtue of the provisions of Section 337 of said Code of Civil Procedure ; and by virtue of the provisions of said Section 2174, 2909 and 2911 of the Civil Code of said State.

Third. That the contract of the "Queen," evidenced by the bill of lading pleaded by libelants, was single and indivisible, that is, to deliver the goods shipped by Hellman, Haas & Co. at the port of San Pedro ; and that libelants waived their right to a performance of that contract when they voluntarily accepted delivery of the goods at San Francisco. And that thereafter their cause of action, if any, was such as arose from the breach of an obligation imposed by the law, independently of contract, and therefore not within the intent of Section 337 of the Code of Civil Procedure.

Fourth. That the cause of action stated in the libels, to wit, that said merchandise was damaged "by reason of having been wet with sea water during said voyage, which by reason of the negligence of said steamship company, its officers and servants, gained access to the interior of said ship where said merchandise was stowed," is not a cause of action upon contract, but is a cause of action upon an obligation imposed by the law, independently of contract, and therefore founded in tort ; and that such being the fact the cause of action was *prima*

facie barred by the provisions of Subdivision 3 of Section 338 of the Code of Civil Procedure, which fixes a limitation of three years within which to commence such an action.

Fifth. That proof of the *cost* of the goods was not proof of the *cash value* of the goods at the port of shipment at the date of shipment; and that as the bill of lading, pleaded by libelants, expressly provides that their claims for damage shall be *restricted* to the *cash value* of the goods at the port of shipment at the date of shipment, there was no proof of the *basis* upon which they had stipulated that their damages should be assessed.

Sixth. That the proof that nine different kinds of goods, consisting of 1,551 packages—the contents thereof ranging in character, as represented by libelants, from drugs and tea to nails—were, without examination being made as to the contents, or as to the condition of the contents, of a single package, sold at auction, on the wharf, as one lot and for a lump sum, does not support a finding that the sum realized at such sale was the then market value of the goods so sold.

Seventh. That the bill of lading containing the reservation on behalf of the "Queen" that the goods were in "*apparent good order*," and that the "*contents and condition of contents were unknown to the steamship company*," it was incumbent upon libelants to prove, before they could recover in damages, that the packages contained the specified merchandise, and that the same was in good order when delivered to the "Queen."

Eighth. That the stranding of the "Queen" at Port

Harford was a peril of the sea, and was the proximate cause of the goods being wet with salt water, and that the "Queen" was, *prima facie*, and until negligence upon the voyage was shown, released from liability, for damage so caused, by the express stipulations of the bill of lading.

Ninth. That the carrier's whole duty to the shipper is performed when it furnishes a seaworthy vessel, properly officered, manned and equipped, and is guilty of no negligence in handling or stowing the goods, or in navigating the vessel on the voyage.

Tenth. That the thirty-day clause of the bill of lading pleaded by libelants inured to the benefit of the "Queen" in this proceeding; and that as libelants alleged that the bill of lading was their contract and that the goods were shipped under it, they were estopped from claiming, and the Court was estopped from holding, that any stipulation thereof was not reasonable, or not binding upon libellants.

And your petitioner believes that each of its said contentions is well founded in the law.

The Circuit Court of Appeals has held to the contrary of your petitioner's contentions in each of the foregoing particulars, while the reported decisions of other United States Courts in other Circuits, and the weight of authority, as your petitioner believes, sustain each of the said contentions of your petitioner, that is to say:

1. In the Eighth Circuit, in the L. B. X., 88 Fed R., 290, it was held that a libel filed against a vessel that was not, at the time, within the district, did not confer jurisdiction, and should be dismissed upon motion.

2. That State statutes have force to add to and to modify the law, as administered in the United States Courts of Admiralty, has been held in the Sixth Circuit in the case of The Guiding Star, 18 Fed. R., 263; in the Second Circuit, in the case of The J. W. Tucker, 20 Fed. R., 129; in the Eighth Circuit, in the case of The Wyoming, 35 Fed. R., 548, and in The Menominie, 36 Fed. R., 197; in the Third Circuit, in The Venture, 36 Fed. R., 285; in the Fourth Circuit, in Clyde *v.* Transportation Co., 36 Fed. R., 501; in the Fifth Circuit, in The Madrid, 40 Fed. R., 677; and by the Circuit Court of Appeals for the Sixth Circuit in The Samuel Marshal, 54 Fed. R., 396, while the Court of Appeals has held against the contention of your petitioner, that the statute of the State of California—Section 813, Code of Civil Procedure—is without force to limit the duration of libelants' lien upon the "Queen."

3. United States Courts in other Circuits have held that an action to recover for damages alleged to have been caused by negligence is founded in tort, and not upon contract, to wit: in the Sixth Circuit, in W. Manfg. Co. *v.* M. & O. R. Packet Co., 21 Fed. R., 896, and in The Liberty No. 4, 7 Fed. R., 226; in the Third Circuit, in The M. Vandercook, 24 Fed. R., 472; and in the Second Circuit, in The Brantford City, 29 Fed. R., 375, and in The Kensington, 88 Fed. R., 331; *and such is the expressed opinion of this Court* in Railroad Co. *v.* Laird, 164 U. S., 393, and, more emphatically, in The John G. Stevens, 170 U. S., 113; while in this case the Court of Appeals has held against the contention of your petitioner, that this action, so based, is based upon contract.

4. The District Court (Tr., p. 261) and the Circuit Court of Appeals have held against the contention of your petitioner that the question of laches should be, *prima facie*, determined by the provisions of Section 337 of the Code of Civil Procedure of the State of California, the four year statute; whereas the Supreme Court of the State of California in Chipman *v.* Morrill, 20 Cal., 131, Thomas *v.* Pacific Beach Co., 115 Cal., 136, and McCarty *v.* Mt. Tecarte L. & W. Co., 111 Cal., 328, has decided that that section applies only when the action is founded upon the breach of an express stipulation of a written contract; and your petitioner believes that such construction, by the State Court, is a part of that section, and should have been so regarded by the Court of Appeals.

5. The District Court and the Circuit Court of Appeals have held, against the contention of your petitioner, that proof of the *cost* of the goods—the time or terms of purchase, or elements of cost, of the same not being shown—is proof of the *cash value*, or *market value*, of the goods *at the port of shipment at the date of shipment*, while United States Courts in the First Circuit, in Tappan *v.* U. S., 2 Mason, 393, U. S. *v.* 16 Pkgs. of Goods, 2 Mason, 48, Alfonso *v.* U. S., 2 Story, 421; in the Second Circuit, in Froloff *v.* N. Y. C. & H. R. R. Co., 10 Blatch., 16; and by the Circuit Court of Appeals in the First Circuit in The H. F. Dimmock, 23 C. C. A., 123; and by this Court, in U. S. *v.* Tappan, 11 Wheat., 419, have, as your petitioner believes, held to the contrary.

6. The District Court and the Circuit Court of Appeals have held, against the contention of your peti-

tioner, that proof that nine different kinds of goods—consisting of 1,551 packages in all—realized when sold at auction as one lot, without opportunity given for examination, and for a lump sum, $1,262.20, is proof that the sum so realized, less the expenses of the sale, was the market value of the goods so sold; while United State Courts in the Second Circuit, in The Marinin S., 28 Fed R., 664, and Wolff *v.* The Vaderland, 18 Fed. R., 733, have held that such a sale does not show the market value of the goods sold.

7. The Court of Appeals has held that libelants were entitled to recover for damages to certain merchandise without proof that such merchandise was in the packages shipped, and without proof that the same was in good order when delivered to the "Queen;" whereas other United States Courts have held, as your petitioner believes, that the burden was upon libelants to show, before they could recover in damages, that the merchandise described in their bill of lading was, in fact, delivered to the "Queen," and that the same was in good order when so delivered; to wit, it was so held in the Second Circuit in Schultz *v.* The Pietro G., 40 Fed. R., 497; and in the First Circuit in Vernard *v.* Hudson, 3 Sumn., 405; and by this Court in Clark *v.* Barnwall, 12 How., 272.

8. The District Court and the Circuit Court of Appeals have held, against the contention of your petitioner, that the voluntary stranding of the "Queen" at Port Harford, whereby the libelants' goods became wet (see statement by proctor for libelants, Tr., page 89), was not, *prima facie*, a peril of the sea, or the proximate cause of the damage to the goods, within the intent of

the clause of the bill of lading relating thereto; while in the Second Circuit, in Bales of Cotton, 8 Blatch., 221; Rathbone *v.* Fowler, 6 Blatch., 294; Fitzpatrick *v.* Bales of Cotton, 3 Ben., 42; and in the First Circuit, in Potter *v.* Ins. Co., 2 Sumn., 197; and by this Court in The Propeller Niagara, 21 Howard, 7, it is, as your petitioner believes, held that stranding is *prima facie* a peril of the sea.

9. The District Court and the Circuit Court of Appeals have held, against the contention of your petitioner, that the "Queen" is liable in damages when it plainly appears, and is found as a fact, that she was a seaworthy ship, and was properly officered, manned and equipped, and that there was no negligence on the voyage.

10. The District Court and the Circuit Court of Appeals have held, against the contention of your petitioner, that the "Queen" is liable in damages for a failure to deliver the goods at destination; and this when the libels do not allege that damages were sustained by reason of the failure to so deliver, and when it affirmatively appears, and is found as a fact, that libelants had accepted delivery of the goods elsewhere.

Your petitioner believes that the Court of Appeals erred in holding against the contention of your petitioner in each of the aforementioned particulars, and that its decision is contrary to the weight of authority in the other Circuits; and is contrary to the decisions of this Court in the particulars aforesaid in so far as the questions involved have been, in other cases, considered and decided by this Court.

The cause is important in several respects:

It involves, among others, the question of whether (*a*) a libel filed against the "Queen" when she was not within the district gave to the District Court jurisdiction to proceed thereon when the vessel afterwards came within the district? And, if that question be answered in the affirmative, (*b*) whether such jurisdiction dates from the day the "Queen" came within the district, or from the day the libel was filed? And (*c*) whether filing a libel against the "Queen" preserved libelants' lien thereon until she was seized, it appearing that the process upon which the steamer was seized was not issued, nor the "Queen" seized, until after the time that the lien would, in any view of the law, have expired had no libel been filed? And (*d*) whether a statute of the State of California fixing a limitation for liens upon vessels engaged in trade between ports in that State shall be given force in the Admiralty to limit the duration of such lien.

Such questions, your petitioner believes, have not heretofore been directly decided by this Court. They are important to your petitioner because if any one of them shall be decided according to its contention, such decision will relieve it not only of the burden of the decree in this case, but also from the large amount of claims asserted in upwards of thirty other libels filed against the "Queen."

And the same result to your petitioner would follow upon the determination that the cause of action alleged in the libel was not based upon the breach of an express stipulation of the bill of lading, but was based upon

negligence, to wit, an alleged violation of an obligation imposed by the law.

The contentions of your petitioner, above stated, relating to proof of *cash value* of the goods at the port of shipment and the date of shipment, and to the manner in which proof of the extent of the damage thereto may be shown, are important not only to your petitioner, but to all persons engaged in commerce; and the decision by this Court thereon will be of great importance as a guide to all shippers and carriers.

Your petitioner herewith presents to this Court and files a duly certified transcript of the entire record of the District Court in the case, as the same appears in the said Circuit Court of Appeals, including the several opinions, together with a brief which discusses the questions at issue.

Your petitioner prays that the writ of certiorari be issued out of and under the seal of this Court directed to the Circuit Court of Appeals of the United States for the Ninth Circuit, commanding the said Court to certify and send to this Court on a day certain, to be therein designated, a full and complete transcript of the record and of all the proceedings of the said Circuit Court of Appeals in the case of the "Pacific Coast Steamship Company, a corporation, Appellant, *v.* Bancroft-Whitney Company, a corporation, A. Haas, J. Baruch and H. W. Hellman, surviving partners of the firm of Hellman, Haas & Company, Appellees," No. 454 on the records of said Court, to the end that the said case may be reviewed and determined by this Court as provided by Section 6 of the Act of Congress entitled "An Act to

establish Circuit Courts of Appeal, and to define and regulate in certain cases the jurisdiction of the Courts of the United States, and for other purposes, approved March 3, 1891."

And your petitioner further prays that the said judgment and decree of said Circuit Court of Appeals be reversed, and the cause remanded with instructions to enter a judgment and decree in favor of your petitioner and against The Bancroft-Whitney Company, a corporation, A. Haas, J. Baruch and H. W. Hellman, surviving partners of the firm of Hellman, Haas & Company, dismissing said libels, with costs.

And your petitioner will ever pray, etc.

PACIFIC COAST STEAMSHIP COMPANY,
Petitioner.

By JOHN L. HOWARD,
Vice-President.

GEO. W. TOWLE, JR.,
508 California Street, San Francisco, California,
Counsel for Petitioner.

UNITED STATES OF AMERICA,
Northern District of California. } ss.

George W. Towle, Jr., being duly sworn, deposes and says: I am counsel for the petitioner above named, and as such have had personal charge of the case in the

United States Circuit Court of Appeals for the Ninth Circuit, and in the District Court of the United States in and for the Northern District of California. I know the contents of the foregoing petition. The facts therein stated are true to the best of my knowledge, information and belief, and this proceeding is not prosecuted for the purpose of delay.

Subscribed and sworn to before me this 29th day of August, 1899.

GEO. W. TOWLE, JR.

F. D. MONCKTON,
Clerk U. S. Circuit Court of Appeals, Ninth Circuit.
[SEAL.]

Certificate of Counsel.

I hereby certify that I have carefully examined the foregoing petition and application for a writ of certiorari, and that in my opinion the same is well founded, and the case is one in which the prayer of the petitioner should be granted by this Court.

GEO. W. TOWLE, JR.,
Counsel for Petitioner.

To The Bancroft-Whitney Company, a corporation, and A. Haas, J. Baruch and H. W. Hellman, surviving partners of the firm of Hellman, Haas & Company, Respondents and Appellees, and Milton Andros, Esq., their Proctor:

Please take notice that on the 9th day of October, 1899, on the opening of Court, or as soon thereafter as the matter can be heard, I shall move the Supreme Court of the United States, at the Court-room thereof in the city of Washington, D. C., that the foregoing petition for a writ of certiorari be granted.

Dated at San Francisco, California, this 29th day of August, 1899.

GEO. W. TOWLE, JR.,

Counsel for Petitioner.

Service of above and receipt of copy thereof, together with copy of the brief, is hereby admitted at San Francisco, this 29th day of August, 1899.

MILTON ANDROS,

Proctor for Appellees.

APPENDIX.

Sec. 335, C. C. P.: The periods prescribed for the commencement of actions other than for the recovery of real property, are as follows: * * *

Sec. 337, C. C. P.: Within four years:

An action upon any contract, obligation or liability, founded upon an instrument in writing executed in this State.

Sec. 338, C. C. P.: Within three years: * * *

3. An action for taking, detaining or injuring any goods or chattels, including actions for the specific recovery of personal property.

Sec. 813, C. C. P.: All steamers, vessels and boats are liable: * * *

5. For non-performance, or malperformance, of any contract for the transportation of persons or property between places within the State, made by their respective owners, masters, agents or consignees;

6. For injuries committed by them to persons or property, in this State.

Demands for these several causes constitute liens upon all steamers, vessels and boats, and have priority in their order herein enumerated, and have preference over all other demands; but such liens only continue in

force for the period of one year from the time the cause of action accrued.

Sec. 2174, C. C.: The obligations of a common carrier cannot be limited by general notice on his part, but may be limited by special contract.

Sec. 2909, C. C.: A lien is to be deemed accessory to the act for the performance of which it is a security, whether any person is bound for such performance or not, and is extinguishable in like manner with any other accessory obligation.

Sec. 2911, C. C.: A lien is extinguished by the lapse of the time within which, under the provisions of the Code of Civil Procedure, an action can be brought upon the principal obligation.

No. 394

FILED
SEP 8 1899
JAMES H. MCKENNEY,
Clerk.

Brief of Towle for Petitioner

IN THE

Filed Sept 8, 1899

Supreme Court of the United States

PACIFIC COAST STEAMSHIP COMPANY (A Corporation),

Appellant, and Petitioner in this Court.

v.

BANCROFT-WHITNEY COMPANY (A Corporation), A. HAAS, J. BARUCH and H. W. HELLMAN, Surviving Partners of the Firm of HELLMAN, HAAS & COMPANY,

Libellants and Appellees.

Brief on Behalf of Pacific Coast Steamship Company, Petitioner.

GEO. W. TOWLE, JR.,
Counsel for Appellant and Petitioner.

15615

IN THE

Supreme Court of the United States

PACIFIC COAST STEAMSHIP COMPANY (A CORPORATION),
Appellant and Petitioner,
v.
BANCROFT-WHITNEY COMPANY (A CORPORATION), A. HAAS, J. BARUCH AND H. W. HELLMAN, SURVIVING PARTNERS OF THE FIRM OF HELLMAN, HAAS & COMPANY,
Appellees.

Brief on Behalf of Pacific Coast Steamship Company, Petitioner.

I.

Referring to the facts stated in the petition filed herewith, petitioner's first contention is, that neither the District Court nor the Court of Appeals had jurisdiction to proceed to a decree upon the libels, in the petition referred to, it appearing that the "Queen" was not within the northern district of California when the libels were filed in the District Court.

That a vessel is within the district when the libel is filed is, by Rule 23, Rules of Practice in Admiralty pro-

vided by this Court, made a necessary allegation of a libel *in rem*.

It cannot be supposed that this Court has made it obligatory upon a libelant to allege, under oath, an idle or needless fact, or to aver that which, if denied, need not be proved. Upon the hearing of the exceptions to the libels the Court found that the "Queen" was not within the district when the libels were filed. The District Court should, thereupon, have dismissed the libels. This, for one reason, because a seizure of the *res* is necessary to confer jurisdiction over it.

Miller *v.* U. S., 11 Wall., 268, 294.
Bruseau *v.* Steam Tug, etc., 4 Fed. R., 459.

And the process of the Court *in rem* does not run beyond the territorial limits of the Court; and a seizure, to give jurisdiction, must be one made within such limits.

Toland *v.* Sprague, 12 Pet., 300.
The Lindrup, 70 Fed. R., 718.
Pinckney *v.* Hungaria, 42 Fed. R., 510.

That a libel *in rem* filed when the vessel is not within the district should be dismissed, upon motion, is held in The L. B. X., 88 Fed. R., 590–596.

No case directly in point is cited by the Honorable Judge of the District Court, nor by the Honorable Judges of the Court of Appeals, in support of their position upon this point. The Court of Appeals upheld the jurisdiction because, as it said, it appears that jurisdiction has heretofore been maintained in cases where, when the libel was filed, the *res* was, while within the Federal district, at the time in the custody of a State Court, citing

The E. L. Cain, 45 Fed., 367; Moran *v.* Sturges, 154 U. S., 256, 279; *Ex parte* Chetwood, 165 U. S., 443, 460; *Ex parte* Johnson, 167 U. S., 120, 125, and saying: "It must be admitted that in such cases the *res* is as much without the jurisdiction of the Federal Court as if it were without the district."

We submit that the conclusion of the Court of Appeals is not justified by the decisions cited. That there is a wide margin between a suspension of proceedings in a case where jurisdiction exists—that is, the suspension of the use of power, to avoid friction—as in the cases relied upon by the Court of Appeals; and this case, where the *res* was not within the territorial limits of the Court when the libel was filed. In the one case the Court has power, but, upon grounds of comity only, temporarily suspends the use of it. In the other case it has no power to use, or to suspend the use of. In the absence of jurisdiction "comity" has no place.

In the "Silver Prince," 1 Ben., 234, cited and approved in Moran *v.* Sturges, 154 U. S., 256, 279–280, which latter case is relied upon by the Court of Appeals, it is expressly held that the possession of the *res* by a State Court sitting within the Federal district does not deprive the Federal Court of its jurisdiction to seize the *res* there situate, but that, upon grounds of policy only, the Federal Court will not intrude upon the possession of the State Court; but will, instead, suspend its proceedings until the *res* passes out from the control of the State Court. The possession of the *res*, by the State Court, is only an obstacle which tends to delay, or to excuse the immediate execution of, the writ of the Fed-

eral Court; just as distance, or physical obstacles, might do; while, if the *res* is not within the Federal district when the writ is issued, the service of the writ is not delayed simply, but the *res* is then beyond the limits to which the writ may ever run, and so long as it remains there—and the legal presumption is that it will so remain—is beyond the possible reach of the writ. In the one case the Federal writ covers the situs of the *res*; in the other it does not. When it does, the question of immediate seizure is one of policy; not of power. When it does not, there is then an entire lack of power to seize.

The question of jurisdiction, as resting upon the situs of the *res*, must be determined upon the facts as they exist when the libel is filed. It may be conceded that the allegation of the libels, that the "Queen" was then within the district, gave to the Court, *prima facie*, authority to issue its writ for the seizure of the vessel. But, as the fact was to the contrary of the averment of the libels, the Court was, by the averment, deceived into doing that which, had the libels truly stated the fact, it would not have done; for surely, had the libels alleged the truth, that the "Queen" was *not* within the district, no writ would have issued thereon, and they would have been dismissed on motion. But being so deceived, the Court should, when the true facts appeared, have done what it would have done in the first instance had the fact, as to the situs of the *res*, been truly stated; that is, have ordered the libels dismissed, upon the ground that as the *res* was not within the territorial limits of the Court when the libels were filed, the libels did not give the Court jurisdiction in the premises.

The question here presented is important, not only in this particular proceeding, but as a principle of Admiralty law of general application upon which there is, at present, a diversity of opinion expressed by Federal Courts in different Circuits. It has never, so far as we can learn, been heretofore presented to this Court for decision. That being so, there is here presented a case of such conflict of decision, upon a fundamental proposition of Admiralty law, as should call into exercise the controlling judgment of this Court in the premises; a case directly within the purview of the provisions of the second paragraph of Section 6 of the Act creating Circuit Courts of Appeals, pursuant to which the petition in this case has been filed in this Court.

II.

Petitioner's second contention is: That the claims against and liens upon the "Queen," resulting in favor of libelants from the shipment of their goods on board of her, expired, terminated and ended long prior to the date that the "Queen" was seized by the marshal under process issued on said libels.

(*a*) In thirty days from the date the goods were shipped.

The following dates are material:

The goods were delivered for shipment on April 28, 1888.

The "Queen" was stranded on April 30, 1888.

The libels were filed on April 28, 1892.

The alias monition, upon which the "Queen" was seized, was issued on May 4, 1892, and the "Queen" was seized on that day.

The libels allege that libelants stipulated, when the goods were shipped, that "It is expressly agreed that all claims against the P. C. S. S. Co., or any of the stockholders of said company, for damage to or loss of any of the within merchandise, must be presented to the company within thirty days from date hereof; and that after thirty days from date hereof no action, suit or proceeding, in any Court of justice, shall be brought against said P. C. S. S. Co, or any of the stockholders thereof, for any damage to or loss of said merchandise; and the lapse of said thirty days shall be deemed a conclusive bar and release of all right to recover against said company, or any of the stockholders thereof, for any such damage or loss."

It is conceded that libelants knew of the misfortune to the "Queen" as early as May 1, 1888; that they received their merchandise from the "Queen" at San Francisco as early as May 10, 1888; that they sold the same—for cash on delivery and delivery on day of sale—on May 19, 1888; and that no claim for loss, or damage, was presented to the steamship company, or libel filed against the "Queen," until the libels herein were filed on April 28, 1892. The merchandise shipped would ordinarily be delivered to the consignee, at destination, within five days from the date that it was received from the shipper.

These facts appearing, petitioner has contended, and here contends, that the thirty-day stipulation of the contract, above set forth, was reasonable; and, further, that as libelants have alleged it, as their stipulation, they cannot be heard to complain that it was not reasonable;

nor that it was not binding upon them. This upon the familiar rule that one cannot be heard to question the validity of, or to contradict, the contract under which he claims, nor the averments of his own pleading.

The District Court and the Court of Appeals have, notwithstanding, held that the stipulation was not reasonable; and further, that the benefit of it, if reasonable, could only be claimed by the steamship company in a suit against it, *in personam*; not in these proceedings, by libelants, *in rem*.

On the contrary, the Circuit Court of Appeals for the Second Circuit has recently held that a similar stipulation, that is, one the benefit of which was, in terms, limited to the owner, inured to the benefit of the ship, in a proceeding *in rem*.

The Kensington, 94 Fed. R., 885, 888.

And this Court has held specifically, in The Schooner Freeman *v.* Buckingham, 18 How., 183, that in *all* causes of action which may arise during the ownership of the person whose ship is proceeded against, no suit could ever be maintained against a ship where the owners were not themselves personally liable; or where the liability had not been given up, as, for instance, in the case of a bottomry bond. From which it follows, logically, that if the thirty-day clause would bar a suit *in personam*, it must also bar a suit *in rem*.

That the thirty-day clause was, in view of the conditions as to shipment and delivery here shown, reasonable, that is, that it gave to the shipper ample time to know of his loss, or of the extent of the damage to his

goods, and to present his claim to the carrier therefor, in all ordinary cases, and particularly in these special cases, is apparent; and there is no claim, asserted by libelants, to the contrary. The question of the reasonableness of the stipulation was not, therefore, in issue. We submit, therefore, that libelants' claims should be held barred under the provisions of that thirty-day stipulation, for, being pleaded by libelants as their stipulation, compliance with it was a condition precedent to their right to recover against the "Queen."

Where a contract stipulates that notice of loss shall be given within a stipulated time, giving such notice is a condition precedent to recovery.

> Cal. S. B. of S. D. *v.* Am. S. Co., 87 Fed., 118, 120.
> Albers *v.* W. U. Tel. Co., 66 N. W., 1040.
> Angel *v.* Cunard S. S. Co., 55 Fed., 1005.
> Moore *v.* Harris, 34 Law Times (N. S.), 519.

(*b*) That such lien of libelants terminated at the expiration of one year from the stranding of the "Queen," to wit, on April 30, 1889, by virtue of the provisions of Section 813 of the Code of Civil Procedure of the State of California.

That section, so far as material, reads:

"All steamers * * * are liable: 5. For non-performance, or mal-performance, of any contract for the transportation of * * * property between places within this State, made by their respective owners, masters, agents or consignees; 6. For injuries committed by them to * * * property, in this State.

"Demands for these several causes constitute liens

upon all steamers * * * but such liens only continue in force for the period of one year from the time the cause of action accrued."

That section recognizes the existence of certain admiralty liens; creates certain others; and, as to all, provides a statute of limitations of one year.

The contracts alleged in the libels were made at San Francisco and covered the transportation of property from one port in the State of California to another therein; and the property was injured, if at all, in said State. The "Queen" was a domestic vessel, her owner a citizen of the State of California, and the shippers were doing business in said State. This being so, it would seem that the law of the State of California should operate upon and limit the rights of the parties in the premises.

In Liverpool S. Co. *v.* Phoenix Ins. Co., 129 U. S., 397, at page 459, this Court said: "The contract being made at New York * * * both parties must be presumed to have submitted themselves to the law there prevailing, and to have agreed to its action on their contract."

"There is," said Matthews, J., in The Guiding Star, 18 Fed., 266, "no circumstance, it seems to me, that takes from the *local law* its equal force and effect with that of the general maritime law."

And the following cases are to the same effect:

The J. W. Tucker, 20 Fed., 129, 134.

The Arctic, 22 Fed., 126, 128.

The Wyoming, 35 Fed., 548, 550.

The Amos D. Carver, 35 Fed., 665, 666.

The Venture, 26 Fed., 285.
The Menominie, 36 Fed., 197.
Clyde *v.* Transportation Co., 36 Fed., 501, 502.
Lamar, J., in The Madrid, 40 Fed., 677, 678.

In Brine *v.* Insurance Co., 96 U. S., 627, 634, this Court said: "That all the laws of a State existing at the time a mortgage or any contract is made, which affect the rights of the parties to the contract, enter into and become a part of it, and are obligatory on all Courts which assume to give remedy on such contract."

And that language is quoted, with approval, in M. K. & T. T. Co. *v.* Krumseig, 172 U. S., 351, 359–61.

In Cowley *v.* Railroad Co., 159 U. S., 569, 582, this Court said:

"The statute of a State * * * may establish new rights *or privileges* which the Federal Courts may enforce on their * * * *admiralty* side, precisely as they may enforce a new right given by statute upon their common law side."

Those cases are, we submit, authority for our contention that the State statute referred to has force to limit the duration of the lien upon the "Queen," *prima facie*, to one year from April 30, 1888.

As a statute of limitations, of repose, it should be given the same force as is accorded to other State statutes of limitations, that is, that statute should determine *prima facie* the limit, in time, of the liability of the vessel proceeded against.

"Where there is nothing exceptional in the case,

Courts of Admiralty govern themselves by the analogies of the common law limitations."

Bailey *v.* Sundberg, 49 Fed. (C. C. A.), 583, 586.
Miles *v.* Vivian, 79 Fed., 848, 852–853.
Southard *v.* Brady, 36 Fed., 560.
Cockrill *v.* Butler, 78 Fed., 679.
Ross *v.* Duval, 13 Pet., 45, 60–61.
Campbell *v.* City of Haverhill, 155 U. S., 610.

This question is akin to that which was presented in M. K. & T. T. Co. *v.* Krumseig, 172 U. S., 351—that is, the force of a State statute to limit, or to enlarge, a remedy in a Federal Court. But this statute does not go so far, or cut so deep, as the statute of Minnesota did. That statute cut very close to the jurisdictional line, in that it authorized suits in equity to be maintained upon facts that were not, under the practice in equity, sufficient. This statute does nothing of the kind, but only makes definite and certain that which before rested entirely in the discretion of the Admiralty Court—gives certainty where before was uncertainty, as to the time when liability shall cease.

(*c*) The libelants' causes of action, if any, were barred in three years from the 30th day of April, 1888, by virtue of the provisions of Subdivision 3, of Section 338, of the Code of Civil Procedure of the State of California.

That section is a part of the general State statute of limitations, which, so far as material, reads:

"Section 335. The periods prescribed for the commencement of actions other than for the recovery of real property are as follows: Section 336 * * *. Section

337 * * *. Section 338. Within three years: 1 * * *. 2 * * *. 3. An action for taking, detaining, or injuring any goods or chattels * * *."

And Section 28 of said Code reads: "An injury to property consists in depriving its owner of the benefit of it, which is done by * * * deteriorating or destroying it."

It is to recover for alleged deterioration of property, caused by sea water, that these libels were filed; and nothing is alleged, or shown, tending to excuse the long delay—four years lacking two days from the date the "Queen" was stranded—in commencing these actions. If, therefore, the State statute, as is held by the Federal cases hereinabove cited, fixes, *prima facie*, a limitation for the commencement of these proceedings, then Subdivision 3, of Section 338, should bar libelants' proceedings.

A simple statement of the terms of the statute, the basis of the action, the date of the stranding, and the date the libels were filed, all above set forth, furnishes, as we conceive, a full and sufficient argument upon this point.

But, to avoid the force of Subdivision 3 of Section 338 of the Code of Civil Procedure libelants have contended, and the District Court and the Court of Appeals have held, that the libels count upon a breach of the special contracts alleged by them, and are, therefore, within the provisions of Section 337 of said Code, which reads:

"Section 337. Within four years. An action upon any

contract, obligation or liability founded upon an instrument in writing executed in this State."

This section, as to the scope of it, has been considered, and construed, by the Supreme Court of California; and that Court has uniformly held that the language of the section has reference only "to actions to recover upon an obligation or liability *created by some express promise or stipulation in the written instrument*, and not to actions on such obligations as merely spring from or grow out thereof in some less immediate way."

Thomas *v.* Pacific Beach Co., 115 Cal., 136, 139.

"In order to be founded upon an instrument in writing, the instrument must itself contain a contract to do the thing for the non performance of which the action is brought."

McCarty *v.* Mt. Tecarte L. & W. Co., 111 Cal., 328, 340.

Chipman *v.* Morrill, 20 Cal., 131.

What, then, is the cause of action alleged in the libels? Do they count upon a breach of some express stipulation of the contracts alleged? We submit that they do not. On the contrary, the libels count upon a breach of an obligation imposed by the law, independently of contract, to wit, negligence in permitting the goods to be wet with sea water.

The contract of the carrier, evidenced by the bills of lading, is single and indivisible, that is, to deliver the goods at destination, in like good order as when received, certain perils excepted To make delivery of the goods at destination, and thereby earn freight, was

at all times the right of the carrier, once the goods were shipped; and to have the goods so delivered, upon payment of the freight money, was then the right of the shipper. This being the case, an action, to be based upon the contract of the carrier, must count, in damages, upon its failure to make delivery of the goods at destination, as agreed. But do these libels so count? Most assuredly they do not. Nor, if they did, could such an action, upon the facts here disclosed, be sustained. This for the sufficient reason that the carrier chose to tender delivery, and the shipper chose to accept delivery, of the goods at San Francisco. By so doing the carrier surrendered its right to earn freight money, and the shipper his right to have the carrier make delivery of the goods at destination. There was a sufficient consideration, moving from the one to the other, to support such waivers. Performance of the mutual contracts, of the one to deliver at destination, and of the other to pay for such delivery, was, therefore, by each, excused. So ended such contracts.

That such was the view taken of the matter by libelants, when the libels were filed, is shown by the absence from the libels of any allegation that damage had been sustained by reason of the goods not being delivered at destination. The libels allege only that the "merchandise was wet with sea water during said voyage, which by reason of the *negligence* of said steamship company, its officers and servants, gained access to the interior of said ship where said merchandise was stowed, to wit, on or about the 30th day of April, A. D. 1888." And the *ad damnum* clause is: "That in consequence of the injury

and damage to said merchandise by sea water, as in the last preceding article herein is mentioned and set forth, the libelants have sustained damages in the sum of * * * dollars."

So alleging, the libels count, not upon a breach of any express stipulation of the carrier's contract, but upon negligence; that is, upon an obligation imposed upon the carrier by the law, independently of contract.

Negligence in a carrier is, by the law of this country, placed outside the possible domain of individual contract. The carrier cannot, by any stipulation, however solemn, relieve itself from liability to the shipper for the result of its negligence. From which it must follow that it cannot, by contract, make any binding stipulation relating thereto.

In the John G. Stevens, 170 U. S., 113, 124, this Court said: "But even an action by a passenger, or by an owner of goods, against a carrier for neglect to carry and deliver in safety, is an action for the breach of a duty imposed by the law independently of contract or of consideration, and is, therefore, founded in tort."

Philadelphia & R. R. *v.* Derby, 14 How., 468.
Atlantic & Pacific R. R. *v.* Laird, 164 U. S., 393.
W. M. Co. *v.* M. & O. R. P. Co., 21 Fed., 896, 902.
The Quickstep, 9 Wall., 665, 667.

It, therefore, follows that the causes of action stated in the libels are not within the provisions of Section 337 of the Code of Civil Procedure of the State of California, as that section has been construed by the Supreme Court of that State. And the construction placed upon that

section, by the highest Court of the State, enters into and becomes, in effect, a part of the language of it when it is being considered by a Federal Court.

Bergman *v.* Bly, 66 Fed. (C. C. A.), 40, 43.

We submit, therefore, that the District Court and the Court of Appeals erred in holding that the causes of action stated in these libels were within the provisions of that section.

What we have said, under this second subdivision of this brief, covers the contentions of petitioner specified under Subdivisions Third and Fourth of its petition.

III.

Petitioner's fifth contention is: That proof of the *cost* of the goods was not proof of the *cash value* of the goods at the port of shipment at the date of shipment.

Libelants allege that they stipulated, when the goods were shipped, that "in settlement of any claim for loss of or damage to any of the within mentioned goods, said claim shall be restricted to the cash value of such goods at the port of shipment at the date of shipment."

Proof, by them, of the cash value of the goods at the port of shipment at the date of shipment was, therefore, a condition precedent to their right to recover, in damages, from the carrier. But they made no such proof. All that they showed was that the goods had cost them a stated sum. But there may be a wide and undeterminable margin, either way, between the cost of goods to a merchant and the cash value of the goods upon a given day and at a certain place. That fact is recognized by libelants' stipulation, relating to cash value.

In the H. F. Dimmock, 23 C. C. A., 123, 131, the Court says: "The third subdivision, which is the great one, and the one ordinarily spoken of by the Courts, *covers those articles which have a recognized market value*, and as to which the rule of damages is rigidly held to be limited *according to such value*. With reference to this great class *the cost is no proper element*, and, if admitted at all in evidence, it is admitted, not as bearing directly on the value of the article, but only indirectly, *when the market is limited*, for the purpose of leading up to a determination of what the market value is."

And Story, J., in Alfonso *v.* U. S., 2 Story, 421, 426, said:

"In the first place, the *market value* is necessarily a matter of opinion, as well as of fact, or rather of opinion gathered from facts. How are we to arrive at it? *Certainly not by the mere purchase made by a single person*, or by purchases made by a few persons; for in either case they may have purchased above or below the market price, or the market price may be fluctuating, and the sales too few to justify any general conclusion * * *. The market price or value, therefore, must in most cases, if not in all, be a matter of fact mixed up with opinion, for it must necessarily include a general price or value in the market, deducible from various averages, and approximations, and the different qualities of the same class of goods."

In Froloff *v.* N. Y. C. & H. R. R. Co., 10 Blatch., 16, 18, the Court says:

"Neither Courts nor juries are permitted to assess values upon conjecture. They must have proof of value,

or evidence of such facts as will warrant a deduction of the value with reasonable certainty;" and (page 19): "It is obvious, therefore, that before you can say by your verdict what the value of these lost articles was in November, 1869, you must have some *specific information* on that *precise point*, and it must come from witnesses, or some one witness, who is competent to speak on the subject."

Goodwin *v.* U. S., 2 Wash., 493.
Tappan *v.* U. S., 2 Mason, 393, 400.
U. S. *v.* Tappan, 11 Wheat., 419.
U. S. *v.* 16 Pkgs., 2 Mason, 48, 54.
Wehle *v.* Haviland, 69 N. Y., 448.

The testimony of Mr. Abraham Haas, a witness for libelants (pages 90-102 of transcript herewith submitted), shows, at the very utmost, only that he made a single purchase of goods, and that using copies of invoices in the possession of his firm a clerk, in its employ, some days after the "Queen" was stranded, prepared a statement of the cost of the goods to exhibit to an insurance company. That such statement showed the cost of the goods to be a stated sum, and that the witness knew that the statement was correct when it was so prepared. But the witness did not testify, nor was he interrogated regarding, the cash or the market value of the goods at San Francisco on the day they were shipped, or at any time. The goods were all of a character commonly dealt in, that is, merchandise having a market value dependent upon quality or grade and condition, and therefore within the terms of the decisions rendered in

the H. F. Dimmock, Alfonso *v.* U. S., Froloff *v.* N. Y. C. & H. R. R. Co., and other cases above referred to.

As libelants had sold all of the goods nine years before the trial, producing no samples, and for nearly four years after the sale had made no claim for damages in the premises, petitioner was, at the trial, without knowledge, or the means of knowledge, as to the quality, or the condition, of the goods, or as to whether the designated goods were, in fact, shipped; save as it might obtain the statements of libelants relating thereto. The acts of libelants had deprived petitioner of every means of getting independent information in the premises. We submit that, in such a state of the case, libelants are not entitled to have the rule relating to proof of cash value, at the port of shipment at the date of shipment, relaxed in their favor. But, on the contrary, that they should be held to a strict compliance with the terms of their stipulation in that regard.

IV.

Petitioner's sixth contention is: That the proof that nine different kinds of goods, consisting of 1,551 packages—the contents thereof, as represented by libelants when the same were shipped, ranging in character from drugs and tea to nails—were, without any examination being made as to the contents or as to the condition of the contents of a single package, sold at auction, on the wharf, as one lot and for a lump sum, does not support a finding that the sum realized at such sale was the then market value of the goods so sold.

No testimony, relating to the extent of the damage to

the goods, was offered by libelants, save the testimony of Mr. E. W. Newhall (Transcript, pages 102–112) that a sale of the goods had been made, for libelants, in the manner above stated.

Such a sale does not, we submit, furnish a reasonable basis from which to determine the extent of the damage to, or the then market value of, the goods when sold. It only shows how much some one was willing to pay for a "pig in a poke," so to speak. The bidder at such sale was simply gambling; that is, taking his chances upon the contents and the condition of the contents of the 1,551 packages; not buying, as a merchant, upon an examination of the goods to ascertain their original quality and their present condition. The deliberate opinion of merchants, as to the value of the goods—expressed in the dollars and cents that they were willing to pay for them—was not obtained by such a sale, because they were not given an opportunity for forming an intelligent opinion, in the premises. Nor were the different kinds of goods sold separately, or in reasonable quantities, so that men of moderate means, or dealers in one line of goods only, could compete in the bidding. The sale, as conducted, was not a legitimate commercial transaction, but was a pure gambling venture. The bidder was required to guess what was in the packages, and what was the quality and condition of the goods, and to bid upon such guess; not given an opportunity to examine and to know, and to bid upon such knowledge. We submit that no case, but this, can be found where such a sale as is here shown has been held binding upon a carrier, as showing the extent of the damage to the goods.

In the Marinin S., 28 Fed., 664, 668, the Court says: "To throw a large quantity of goods on the market for sale at auction, as damaged goods, upon such slight examination, at the assumed risk and loss of the vessel, appears to me to be as unreasonable and unjust as it would be ruinous in its results to carriers. Looking to the just protection of the interests of carrying vessels, as well as of consignees, a Court of Admiralty cannot support any such unreasonable and precipitate action."

Wolff *v.* The Vaderland, 18 Fed. R., 733, 736.
Tronson *v.* Dent, 8 Moore P. C., 419.

That prices realized at sales at public auction, where the sales were properly conducted, have been held evidence of the market value of the goods sold, is not in conflict with petitioner's contention; for it may be conceded that where the goods are shown to have been open to the inspection and examination of the bidders, and the bidders have examined the same; and the different kinds of goods have been sold separately and in reasonable lots or quantities; that then the deliberate opinions of merchants—evidenced by the prices they were willing to pay—as to the value of the goods sold, may be as reliable evidence upon that point as can be obtained. Had this sale been shown to have been so conducted, we should not be here heard protesting. In the one case we have the opinion of merchants based upon knowledge; in the other, the opinion of a speculator based upon his imagination. While the former is competent evidence, the latter is not.

V.

Petitioner's seventh contention is: That the bill of lading containing the reservation on behalf of the "Queen" that the goods were in "apparent good order" and that the "contents and condition of contents were unknown to the steamship company," it was incumbent upon libelants to prove, before they could recover in damages, that the packages contained the specified merchandise and that the merchandise was in good order when delivered to the "Queen."

No evidence, other than the bill of lading, was offered by libelants upon any of the points here specified.

"There is no presumption that the goods were in good order when received by the carrier."

5 Am. & Eng. Encyc. of Law (2nd Ed.), pp. 353–4.
Marquette, etc., *v.* Kirkwood, 45 Mich., 51.
Smith *v.* New York, etc., R., 43 Barb., 225.

"A bill of lading which acknowledges the receipt of a specified number of packages, but contains the phrase 'contents unknown,' cannot ordinarily be evidence of what the packages contained."

4 Am. & Eng. Encyc. of Law (2nd Ed.), 523.
Vernard *v.* Hudson, 3 Sumn., 405, 407.
The California, 2 Sawy., 12.
Hadden *v.* Parry, 3 Taunt., 303.
Fasset *v.* Ruark, 3 La. Ann., 694.
Miller *v.* Hannibal, etc., R., 90 N. Y., 430.
Clark *v.* Barnwall, 12 How., 272, 273.

"The words 'contents unknown' being annexed to a bill of lading, imply that the master only meant to acknowledge the shipment in good order of the cases as to outward condition."

Clark *v.* Barnwall, 12 How., 272, 273.

Where the bill of lading contains the reservation that the specified packages are "in apparent good order," or "value, weight and contents and condition of contents are unknown," or some reservation of that kind, the burden is on the shipper to prove the actual contents and condition when shipped.

Schultz *v.* The Pietro G., 40 Fed., 497.
The Andover, 3 Blatch., 303.
Nicol *v.* Castle, 9 Bomb. H. Ct. R., 321.
Jessel *v.* Bath, L. R., 2 Exch., 267.
The "Vicenzo T.," 10 Ben., 228.
The Columbo, 3 Blatch., 531.
Wentworth *v.* The Ship Realm, 16 La. Ann., 18.

"The rule as to burden of proof in an action against a carrier for loss or injury to goods is, that the plaintiff is first bound to show affirmatively a receipt of the goods in good order, by the carrier."

5 Am & Eng. Encyc. of Law (2nd Ed.), p. 353.

The bills of lading containing the specified reservations, and libelants not having tendered any evidence, other than the bills of lading, that the packages contained, when shipped, the specified merchandise, or that the same was then in good order, libelants have, under the authorities cited, failed to maintain their case.

VI.

Petitioner's eighth contention is: That the stranding of the "Queen" at Port Harford was a peril of the sea, and was the proximate cause of the goods being wet with sea water; and that the "Queen" was *prima facie*, and until negligence upon the voyage was shown, released from liability for damage so caused, by the express stipulations of the bill of lading.

"Stranding is a peril of the seas."

15 Am. & Eng. Encyc. of Law, p. 376, and note "Stranding" and cases cited.

The Cressington, L. R. Prob. Div. 1891, 152, 160.

And a voluntary stranding, as shown in this case, to escape from an impending *vis major*, is a peril of the seas.

Redman *v.* Wilson, 14 M. &. W., 476, 482.
Bales of Cotton, 8 Blatch., 221.
Potter *v.* S. Ins. Co., 2 Sumn., 197.
Fitzpatrick *v.* Bales of Cotton, 3 Ben., 42.
Rathbone *v.* Fowler, 6 Blatch., 294.

"In all cases the law regards the proximate cause of the loss," and stranding is a peril of the seas, "even if so connected with a state of unseaworthiness as that it would prevent any one who knowingly sent her out in that state from recovering indemnity for their loss."

Dudgeon *v.* Pembroke, L. R. 9 Q. B., 581, 595.
Durham *v.* Musselman, 2 Blackf., 96.
Railroad Co. *v.* Reeves, 10 Wall., 176.
Chicago, etc., R. Co. *v.* Elliott, 5 C. C. A., 347.

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But the District Court found, and the finding is not disturbed by the Court of Appeals, that the "Queen" was seaworthy when she sailed.

In Redman *v.* Wilson, 14 M. & W., 476, 482, Baron Parke, in delivering the opinion of the Court, said:

"The jury having found that the ship was seaworthy when she sailed from London. * * * the only question discussed upon the argument was whether the loss was occasioned by the perils of the sea; and it was contended, on behalf of the defendant, that the attention of the jury ought to have been directed to the negligent mode of handling the cargo, and that if they thought the loss was the result of such negligence, the defendant was entitled to a verdict. But it appears to us that the rule '*causa proxima non remota spectatur*' applies to this case, and that the immediate cause of loss was the peril of the sea, for the stranding was a loss by a peril of the sea; and if it be said that it was voluntary, it was only to avoid the sinking of the vessel, which would have been a peril of the same sort."

Libelants allege that they stipulated that the "Queen" "shall not be held responsible for any damage or loss resulting from * * * any * * * accident, or dangers of the seas, rivers, roadsteads, harbors, or of sail or steam navigation of whatever nature or kind soever."

Proctor for libelants, in his opening statement to the Court, at the trial, said: "When she (the "Queen") got within about three or four hundred yards, two or three hundred yards, of the wharf where she usually made fast, she sank; the water came up in the engine room, the

fires were extinguished, and the vessel sank, I think in about seventeen feet of water:—I am not sure about that. The consequence was, that all the merchandise on board of her was submerged." (Transcript, p. 89.)

Thus, we have the statement by libelants that the merchandise were wet as the result of the stranding.

But the authorities establish that stranding is, *prima facie* at least, a peril of the seas. And libelants allege that they expressly stipulated that the "Queen" should not be liable for damage resulting from a peril of the seas. The loss complained of is, therefore, shown to be within an exception in the bill of lading.

Libelants alleged that the goods were wet as the result of negligence. Their proofs show, only, that the goods were wet as the result of a stranding. But stranding is an excepted peril.

"In this stage and posture of the case the burden is upon the plaintiff to establish the negligence, as the affirmative is upon him."

Clark *v.* Barnwall, 12 How., 272, 280.
The New Orleans, 26 Fed., 44.

But the District Court found, and the finding was not disturbed by the Court of Appeals, that there was no negligence upon the voyage; and libelants made no effort to show that there was. On the contrary, they rested entirely upon the presumption which they claimed arose from the fact that the goods were wet with sea water, as the result of the stranding. It was not shown, or claimed, that libelants' goods were reached by any water that entered the "Queen" prior to the stranding.

We submit, therefore, that the burden of proof was upon libelants, to show negligence in the stranding; and that as no proof of such negligence was offered, even, they should fail in these proceedings.

VII.

Petitioner's ninth contention is: That the carrier's whole duty to the shipper is performed when it furnishes a seaworthy vessel, properly officered, manned and equipped, and is guilty of no negligence in handling, or stowing, the goods, or in navigating the vessel on the voyage.

In Lawrence *v.* Minturn, 17 How., 104, 112, this Court said:

"In general, the owner warrants the sufficiency of his vessel to carry the cargo put on board by the freighter, provided the vessel be not injured by a peril of the sea. Besides this he contracts for the use of due care and skill in stowing the cargo and in navigating the vessel."

When entire seaworthiness is shown to have existed at the inception of the voyage, it will rebut a presumption of negligence arising from the fact that the goods were wet as the result of the vessel springing a leak, or leaking, while on the voyage—that is, the presumption, in such case, will be that such leak was, if unexplained, the result of a peril of the sea.

The Edwin I. Morrison, 153 U. S., 214.

The Compta, 4 Sawyer, 377.

That the "Queen" was entirely seaworthy when she sailed is found as a fact by the District Court, and the finding was not disturbed by the Court of Appeals.

But, as the "Queen" was not shown to have encountered tempestuous weather, and no specific cause for the leak was shown, or known, nor the particular locality of it pointed out; other than as being in the side of the vessel within the area of the starboard alleyway; and as it appeared that there were movable dead lights in the side of the vessel, within that area, which were shown to have been properly closed and fastened when the "Queen" sailed, and to be situate so near to the water line—within eighteen inches of it, in smooth water—that had one been open when the steamer sailed water would have entered it, and have continuously flowed through it, for more than eleven hours before water was discovered to be entering the vessel; the sea, during that time, constantly washing much above the level of the dead lights; and the Court finding that the evidence all tended to show that water could not have been entering the starboard alleyway but a very short time before the water was discovered on the engine room floor, and that the dead lights could not have been reached by any one on board the steamer during the voyage; and it appearing that a diver had succeeded in finding, and in stopping, the leak, at Port Harford, so that the "Queen" did not leak while being towed back to San Francisco, the District Court reached the conclusion that water had entered the "Queen" through a dead light, and that she was liable for libelants' damage, in the premises; and this conclusion was concurred in by the Court of Appeals.

Libelants did not, in their libels, or by evidence at the trial, show, or claim, that a dead light was the aperture

through which the water had entered the "Queen" prior to the stranding. Petitioner showed, by the master of the "Queen" and others of her crew, the general locality of the leak, the time that it first became known, and the extent and effect of it, and that no one on the vessel knew what it was that had caused it.

Libelants did not, by cross-examination, or otherwise, endeavor to ascertain, or to show, the exact size, or locality, of the aperture.

Petitioner tried the cases upon the theory announced in The Edwin, 87 Fed., 540, 542, to wit:

"The claimant is not required to present either a theory or an explanation. He may content himself with adducing evidence sufficient in weight to counterbalance that produced by libelant in support of his particular theory."

And, in reliance upon the rule stated in The Edwin I. Morrison, and The Compta, above cited, that is, that seaworthiness at the inception of the voyage, and due care during it, when shown, raise a presumption that damage to goods from sea water—bad stowage not being claimed—results from a peril of the sea; thus bringing the cause of the damage within one of the excepted perils, and placing the burden of proof of negligence upon libelants.

In The Compta, 4 Saw., 375, 377, the Court says:

"The carrier to make good his defense is bound to show that the damage arose from a sea peril. It is not enough for him to show that it might have arisen from that cause. He must prove that it did. *This proof* can be afforded either by showing a sea peril of such a

character that injury to the vessel, however staunch and seaworthy, would be its natural and necessary consequence; or, by direct testimony of those who observed its effect upon the ship; or, by proving her condition on her arrival; or, *he may exclude every other hypothesis of causation*, by satisfactory proof that she was tight, staunch and seaworthy at the commencement of the voyage."

And this Court, in The Edwin I. Morrison, 153 U. S., 199, 214, states the rule substantially to the same effect

Again, we submit that the evidence relating to the dead lights, above briefly adverted to, is such that the conclusions of the Court that an open dead light—negligently left open when the steamer sailed—was the aperture, cannot be logically drawn therefrom. Such a conclusion not only does violence to all the oral testimony in the case but to the silent, irrefutable testimony of physics as well. The small quantity of water in the starboard alleyway at 2.30 o'clock A. M., and the slight list of the vessel at that time, followed by the large inflow of water and the consequent greatly increased list within half an hour thereafter, furnish conclusive evidence that whatever was the aperture and however it was caused, it had its origin but a few minutes before water was discovered on the engine room floor—intermittently, that is, as the vessel would roll to port, dropping there from a small aperture in the bulkhead of the alleyway situate but four or five inches above the alleyway floor.

"Where the evidence is left in such condition that the Court can give no logical reason for determining the issue in favor of the libelant, it is just that the presump-

tion that the person charged with tort is not guilty, should be maintained."

The Meta, 88 Fed., 21, 22–3.

Rogers *v.* Louisville & N. R. Co., 88 Fed., 462.

Petitioner's tenth contention is sufficiently considered in connection with its second contention herein.

In this brief we have not endeavored to argue the case, upon the facts and the law, with that fullness which the case will demand and receive upon a hearing had with the record certified before the Court. On the contrary, we have sought chiefly to designate the errors complained of, and to show that there are here presented questions of such importance as will justify our petition for the judgment of this Honorable Court in the premises.

We pray the kind indulgence of the Court, and that petitioner's prayer may be granted.

Respectfully submitted,

GEO. W. TOWLE, JR.,
Counsel for Petitioner.

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Brief of Reed Esq 130

Appellant's Brief

Filed Dec. 4, 1900.

Supreme Court of the United States.

PACIFIC COAST STEAMSHIP COMPANY, a Corporation,
Appellant,

against

BANCROFT-WHITNEY COMPANY, a Corporation; A. HAAS, J. BARUCH and H. W. HELLMAN, surviving partners of the firm of Heliman, Haas & Company,
Appellees.

BRIEF ON BEHALF OF PACIFIC COAST STEAMSHIP COMPANY, APPELLANT.

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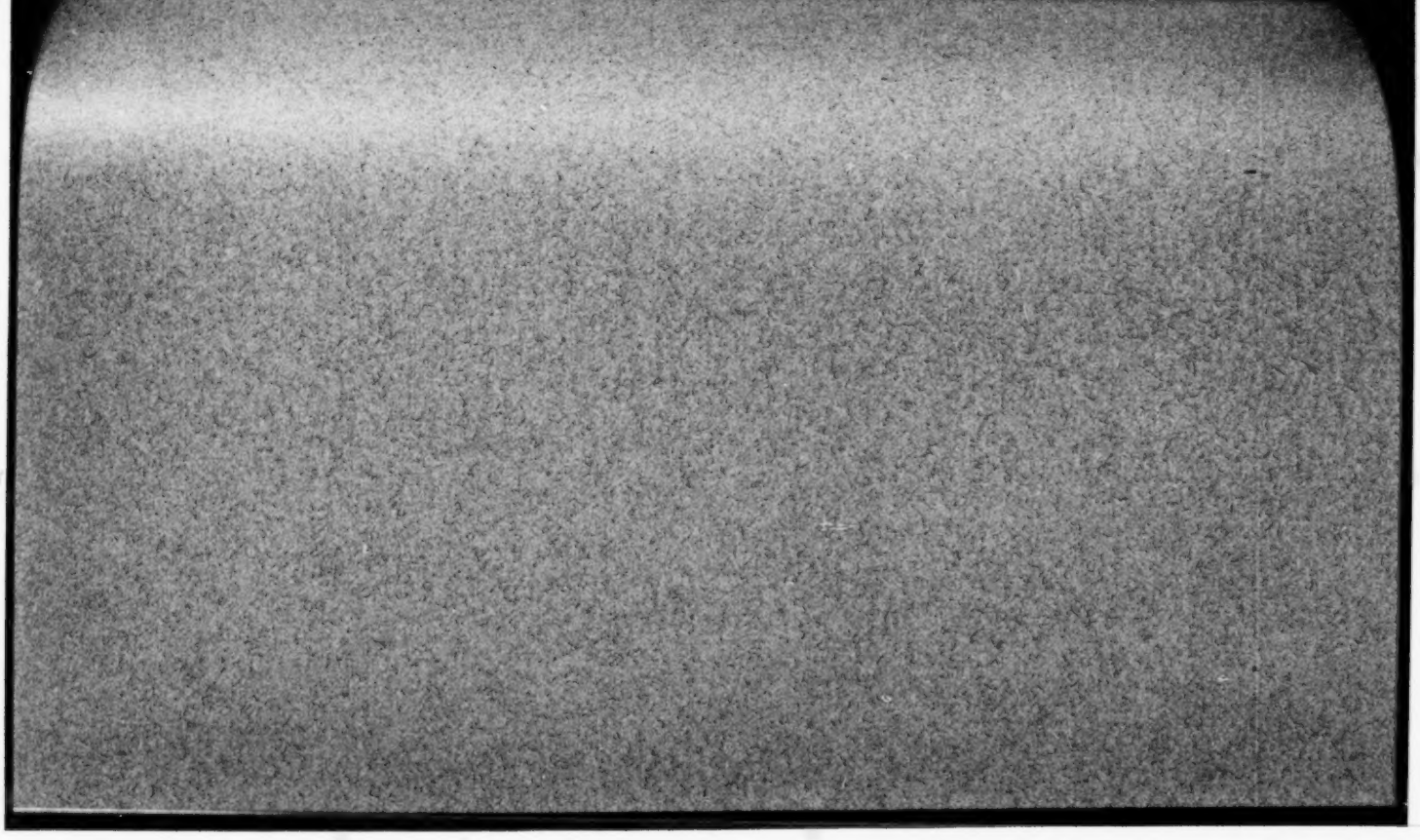

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In the Supreme Court of the United States.

PACIFIC COAST STEAMSHIP COMPANY, a Corporation,
Appellant,

AGAINST

BANCROFT-WHITNEY COMPANY, a Corporation; A. HAAS, J. BARUCH and H. W. HELLMAN, surviving partners of the firm of Hellman, Haas & Company,
Appellees.

BRIEF ON BEHALF OF PACIFIC COAST STEAMSHIP COMPANY, APELLANT.

Statement.

The Pacific Coast Steamship Company, a corporation, respectfully shows as a *statement of the case:*

That at 2 o'clock in the afternoon of the 29th day of April, 1888, its steamship "Queen of the Pacific," otherwise and hereinafter called "Queen," sailed from the port of San Francisco, in the State of California, on a voyage to San Diego and intermediate ports in said State, having on board a cargo of general merchandise, and upwards of 200 persons, certain of which merchandise was owned by and consigned to Hellman,

Haas & Co., a co-partnership, consisting of A. Haas, J. Baruch, H. W. Hellman and Jacob Haas (Record, p. 55), and certain thereof was owned by Bancroft-Whitney Co., a corporation.

That a little more than twelve hours after the "Queen" sailed—that is, at 2:30 o'clock A. M., on April 30, 1888—it was found that water was entering from the sea into a water-tight compartment in the between-decks section of the vessel known as the "starboard alleyway," that compartment being about 100 feet long by 10 feet wide and 9 feet high, and then closed at each end by iron bulkheads, having therein iron doors, which were then closed and fastened with set-screws; and at that time the compartment was stowed full of freight. The port side or wall of the compartment was the iron bulkhead of the engine room, and it was the discovery of water, intermittently flowing through an aperture in that wall about the size of a ten-penny nail, and situate four or five inches above the floor of the "alleyway" and dropping thence onto the floor of the engine room, that first indicated to those on board that anything was wrong with the vessel. Diligent effort was at once made by the master and crew to ascertain the place at which the water was entering the vessel, and, while it was found that the leak was located in the side of the ship within the area of the "starboard alleyway," its exact location could not be ascertained. Up to the time that the water was discovered the steamer had had no appreciable list, but within half an hour thereafter she had gradually acquired a list of six or seven degrees to the starboard, and that fact, and the constant and rapid increase of the list thereafter, indicated to the master that such an aperture had been caused in the side of the ship that it would not be prudent to open the alleyway doors, and that the safety of all concerned required that the steamer should be stranded upon the beach, which was thereafter done at Port Harford, in said State, the "Queen" then having a list of about thirty (30)

degrees to starboard. Upon the vessel being so stranded, she nearly filled with water, and lay in an entirely helpless condition for three or four days. During that time the services of a diver were procured from San Francisco, and he, after repeated efforts, found the leak and stopped it, whereupon the water was pumped out of the vessel and she floated and was towed back to San Francisco. On arrival at San Francisco her cargo was all discharged upon the wharf and delivery thereof there tendered to and accepted by the several owners, they first giving their several general average bonds.

The merchandise, delivery of which was so accepted by Hellman, Haas, & Co., with which we are here especially concerned, was by them delivered to Newhall Sons & Co., auctioneers, for sale at public auction without notice to claimants, and was so sold, for account of Hellman, Haas & Co., on or about the 19th day of May, 1888, and the net proceeds of the sale were paid to that firm, by Newhall Sons & Co., on or about May 28, 1888. The merchandise shipped to domestic coast ports would, ordinarily, be delivered to the consignee, at destination, within five days from the date that it was received from the shipper.

No claim for damage to such merchandise, or to any thereof, was made upon the owners of the "Queen" prior to the sale, nor were the owners of the "Queen" notified of the intended sale. The merchandise so sold—represented by libellants as consisting of rice, nails, tea, drugs, chowchow, pickles, canned vegetables, oil in bottles, sugar in barrels and half barrels, and currants in barrels, 1,551 packages in all—was, so far as appears, all sold as one lot, without examination of the contents of the packages, or any thereof, being made by any one, or an opportunity for such an examination given to the persons attending the sale. The terms of sale were cash upon delivery, and such delivery to be made before dark of the day of sale. The lump sum for

which the goods were so sold was $1,262.20 and the net sum paid to Hellman, Haas & Co. was $1,190.09.

The steamer, after discharging her cargo as aforesaid, was repaired at San Francisco, and thereafter was continuously employed between domestic coast ports, or was lying in San Francisco Bay until she was, under alias process issued in this proceeding on May 4, 1892, seized at said San Francisco on said day; but no claim was made upon her owner, or libel filed against the steamer, for damages in the premises, until the 28th day of April, 1892, four years, lacking two days, from the date that the steamer was stranded at Port Harford, and more than three years and eleven months after the date that the merchandise was so sold for account of Hellman, Haas & Co.

When the libels were filed, or thereafter until the 4th day of May, 1892, the "Queen" was not within the northern district of California (Record, pp. 19–20, and 24).

Each of the libels, after stating that it was "in a cause of contract civil and maritime," and alleging the delivery of the goods to the Pacific Coast Steamship Company for shipment to destination upon the "Queen," and that the same were shipped under a contract of affreightment, in writing, wherein the steamship company "acknowledged to have received said goods *in apparent good order*," and promised to deliver the same, at destination, "in like good order as when received, *certain perils in said agreement mentioned excepted*," and that a copy of said agreement is annexed to the libel "*and made a part hereof*," and that said "Queen" sailed with the goods on board thereof, alleges that "notwithstanding said contract of affreightment * * * said merchandise was not delivered" at destination "or at any other place in like good order as when received, but on the contrary, was returned to said port of San Francisco in a greatly damaged condition, *by reason of having been wet with sea water* during said

voyage, *which by reason of the negligence* of said steamship company, its officers and servants, *gained access to the interior of said ship where said merchandise was stowed*, to wit, on or about the 30th day of April, A. D. 1888. * * * That in consequence of the injury and damage to said merchandise *by sea water* as in the last preceding article herein is mentioned and set forth the *libellants have sustained damages* in the sum of," in the case of Hellman, Haas & Co., $9,015.24, and in the case of the Bancroft-Whitney Co., $455. And further alleged "that said steamship is now within the northern district of California," and the premises within the admiralty and maritime jurisdiction of the Court, to wit, the District Court of the United States for the northern district of California, in which said libels were filed. (See pp. 5 to 14 of Record.)

The bill of lading for the goods of Hellman, Hass & Co.—made a part of the libel with which we are here principally concerned—contained, among other stipulations, the following :

> "Shipped * * * per the Pacific Coast Steamship Company's line of steamers, to be forwarded on the steamer 'Queen' * * * the following property, *in apparent* good order, except as noted, *valued, weight, contents and condition of contents being unknown to said company* * * * to be delivered at the vessel's tackle, in like apparent good order and condition, at the port of San Pedro, unto Hellman, Haas & Co., or assigns, * * * subject to the following conditions, which are made a part of this bill of lading: * * * The company shall not be held responsible or accountable for * * * damage arising from * * * accidents to or from machinery, boilers or steam, *or any other accidents or dangers of the seas, rivers, roadsteads or harbors, or of sail or steam navigation, of what*

nature or kind soever. The company shall not be liable, or accountable, for the hidden contents of packages, *for weight, leakage, breakage,* shrinkage, *rust,* loss or damage resulting from insecurity of packages * * * It is agreed that in the settlement of any claim for loss of or damage to any of the above mentioned goods, *said claim shall be restricted to the cash value of such goods at the port of shipment at the date of shipment.* It is expressly agreed that all claims against the P. C. S. S. Co., or any of the stockholders of said company, for damage to or loss of any of the within merchandise, must be presented to the company within thirty days from date hereof; and that after thirty days from date hereof, no action, suit or proceeding, in any Court of justice, shall be brought against said P. C. S. S. Co., or any of the stockholders thereof, for any damage to or loss of said merchandise; and the lapse of said thirty days shall be deemed a conclusive bar and release of all right to recover against said company, or any of the stockholders thereof, for any such damage or loss."

And said bill of lading had, indorsed thereon, a specification of the packages of merchandise represented by it, and, in addition thereto, the words "*owner's risk.*" (See Bill of Lading, p. 14).

The other contracts of affreightment were, save as to the words "owner's risk," substantially. the same, in their stipulations, as the said bill of lading (see p. 18 of Record).

When the libels were filed—to wit, on the 28th day of April, 1892, a monition was issued thereon and placed in the hands of the marshal for service, by attachment of the "Queen" (Record, pp. 19, 20), and the same was on May 3, 1892, returned not served by reason of not finding the "Queen" within the district (Record, pp. 19, 20).

On May 4, 1892, an alias monition was issued Record, pp. 20, 21), and the "Queen" seized thereunder on that day (Record, p. 21).

Thereafter, and on the 16th day of May, 1892, your petitioner, as claimant of the "Queen," filed exceptions to said libels (see pp. 22, 23 of Record) upon substantially the following grounds:

FIRST. That the libels show that the libelants have no cause of action against and no lien upon the "Queen."

SECOND. That the libels show that the causes of action therein stated, if any, were waived and abandoned by virtue of the special provisions of the several contracts pleaded by libelants, to wit, the thirty (30) day clause thereof, long prior to the date said libels were filed.

THIRD. That said libels show that the demands asserted thereby are stale, neglected and legally abandoned; and are barred by the statutes of limitations of the State of California relating thereto—to wit, Section 337 of the Code of Civil Procedure, which provides a limitation of four (4) years within which to commence an action based upon a breach of an express stipulation of a contract in writing, executed in this State; Subdivision 3 of Section 338 of the same Code, which provides that actions for injuries to personal property must be commenced within three (3) years from the date of the injury; Section 2174, Civil Code, which provides that the obligations of a common carrier may be limited by special contract; Section 2909, Civil Code, which provides that a lien is to be deemed accessory to the act for the performance of which it is a security, and is extinguished in like manner with any other accessory obligation; and Section 2911, Civil Code, which provides that a lien is extinguished by the lapse of time within which, under the provisions of the Code of Civil Procedure, an action can be brought upon the principal obligation. So much of these stat-

utes as is deemed necessary to the decision of this case are as follows:

SECTION 335, CIVIL CODE OF PROCEDURE: The periods prescribed for the commencement of actions other than for the recovery of real property, are as follows: * * *

SEC. 337, C. C. P.: Within four years:

An action upon any contract, obligation or liability, founded upon an instrument in writing executed in this State.

SEC. 338, C. C. P.: Within three years: * * *

3. An action for taking, detaining or injuring any goods or chattels, including actions for the specific recovery of personal property.

SEC. 813, C. C. P.: All steamers, vessels and boats are liable: * * *

5. For non-performance, or malperformance, of any contract for the transportation of persons or property between places within the State, made by their respective owners, masters, agents or consignees;

6. For injuries committed by them to persons or property in this State.

Demands for these several causes constitute liens upon all steamers, vessels and boats, and have priority in their order herein enumerated, and have preference over all other demands; but such liens only continue in force for the period of one year from the time the cause of action accrued.

SEC. 2174, C. C.: The obligations of a common carrier cannot be limited by general notice on his part, but may be limited by special contract.

SEC. 2909, C. C.: A lien is to be deemed accessory to the act for the performance of which it is a security, whether any person is bound for such performance or not, and is extinguishable in like manner with any other accessory obligation.

SEC. 2911, C. C.: A lien is extinguished by the lapse of the time within which, under the provisions of the Code of Civil Procedure, an action can be brought upon the principal obligation.

Further, that the Court had not jurisdiction in the matters alleged, because said steamship "Queen" was not within the territorial jurisdiction of the Court when the libels were filed.

Further, that the lien upon said "Queen" in the premises had expired before the "Queen" was brought within the jurisdiction of the Court, and this by reason of the fact that the causes of action stated in the libels accrued, if at all, on April 30, 1888, and the vessel was not seized by the marshal until May 4, 1892, more than four years after the date of the matters complained of.

Upon hearing had the exceptions were each and all overruled; the Court then finding as a fact that the "Queen" was *not* within the district when the libels were filed (see pp. 24-5, Record).

Thereupon the Pacific Coast Steamship Company filed its answers to said libels, by which it admitted the shipments to have been made under the special contracts relating thereto pleaded by libelants; denied that there had been the negligence alleged in the libels, or any negligence in the premises; admitted that the merchandise was not delivered at the destination stated in said contracts; alleged the misfortune to the "Queen" as hereinabove stated; that the "Queen" was stranded at Port Harford; that such stranding was necessary and was done by the master of the "Queen" as a measure of prudence and in the interest of all concerned in the safety of the ship and the cargo and the persons on board of her, and that the merchandise was wet as the result of such stranding; that the merchandise was all returned to San Francisco on the "Queen," and there delivered to and accepted by the owners thereof, and denied that libelants had suffered damages in the premises to the extent of the sums stated by them, or to any extent, or at all. Alleged that the "Queen" was in all respects seaworthy when she sailed on said voyage; that she was properly provisioned and supplied and was furnished with a competent master

and crew. Further alleged, as a defense, the thirty-day clause of the bill of lading, pleaded by libelants and heretofore set forth, and that no claim had been presented, or suit brought, within such thirty days, or at any time prior to filing the libels herein; that libelants knew of the stranding of the "Queen," and that their merchandise had been wet with sea water as the result thereof, on or prior to the 1st day of May, 1888; that the demands asserted in the libels were barred by Section 337 of the Code of Civil Procedure of the State of California, and by Subdivision 3 of Section 338 of said Code, and by Section 813 of said Code—which latter section provides a limitation for one year for liens upon vessels engaged in carrying goods from one port to another in said State—and by the laches of libellants in prosecuting the same.

Thereafter the cases above referred to—the same being two only out of more than thirty libels filed against the "Queen" on August 28, 1892, and on subsequent dates—came on for hearing before the Court, and it was then admitted that if the "Queen" was liable to Bancroft-Whitney Co. at all she was so liable in the sum of two hundred dollars, and no more. There was no admission relating to the claim of Hellman, Haas & Co.

Counsel for Hellman, Haas & Co., or, more accurately, for The Magdeburg General Insurance Company suing in the names of three of the surviving partners of that firm (see pages 15 and 19 of Record) to maintain its libel, called a witness who testified that Hellman, Haas & Co. knew of the stranding of the "Queen" as early as May 1, 1888, and that subsequent to that date the witness, a member of that firm, had instructed a clerk in its employ to prepare, from copies of invoices in the possession of that firm, a statement of the *cost* of the goods on board the "Queen." That the witness knew

that the statement so prepared was correct, and was for exhibition to an insurance company with which that firm then had an "open policy"; and that the *cost* of the goods to Hellman, Haas & Co., as shown by such statement, was the sum of $10,205.13; that Hellman, Haas & Co. had accepted delivery of the goods, from the "Queen," at San Francisco; and by, another witness, proved that the packages were wet when delivered from the "Queen," and that the nine lots of goods, 1,551 packages in all, were sold at public auction at San Francisco, for account of Hellman Haas & Co., on the 19th day of May, 1888, for the lump sum of $1,262.20, and that the net sum realized by Hellman, Haas & Co. was $1,190.09; and that such auction sale was advertised for two days in one newspaper. That no examination of the contents of the packages was made, and that the terms of sale were cash on delivery, and delivery to be made before dark of the day of sale.

The foregoing was all the evidence introduced by libellants to show the contents of the packages, and the condition of the contents thereof when delivered to the "Queen," and to show the alleged negligence and the extent of the damage to the goods; and on that they rested their case.

Claimant, your petitioner, thereupon moved for a judgment in its favor, which was denied

Thereupon claimant introduced evidence from which the Honorable Judge of the District Court found that the "Queen" was entirely seaworthy when she sailed on the voyage in question, and was properly officered, manned and equipped (Record, pp. 157–164; that there was no evidence indicating negligence of officers or crew in navigating the vessel (Record, pp. 164–5); that water had not been flowing very long into the compartment when the leak was discovered (Record, pp. 165–6); that the testimony rebuts any presumption that a dead light in that compartment could have been

opened by any one on the voyage (Record, p. 166). and that the evidence all tends to show that a dead light in that compartment could not have been open when the "Queen" sailed upon that voyage (Record, pp. 164, 166), and that the water entered the "Queen" through a dead light. The Court further found that the Magdeburg General Insurance Company was the real libellant, and thereupon ordered judgment in favor of libellants, with a reference to a master to ascertain and report the damages sustained (Record, p. 171).

Thereupon the evidence on behalf of libelants, above referred to, was all re-introduced before the Master, and libelants there admitted that no claim for damages to any of the merchandise had ever been made by them until the said libels were filed (Record, pp. 174-5).

Thereupon the Master reported that the *market value* of the said merchandise of Hellman, Hass & Co., at the time of shipment, was the sum of $10,205.13, and that its market value in its damaged condition, when received by libelants at San Francisco, was $1,190.09, the net sum realized from the sale, and that the damage sustained by Hellman, Haas & Co. in the premises was the difference between the two sums—to wit, between the *cost* price and the *sale* price—that is, the sum of $9,015.04 (Record, pp. 175-6).

To that report claimant filed exceptions upon the grounds, among others, that there was no evidence produced before the master which showed, or tended to show, the *cash value* or the *market value* of the merchandise *at the port of shipment at the date of shipment*, or which would support the finding of the master as to its market value on the day it was shipped; and that no evidence had been introduced before the master which supported his finding that the market value of the merchandise in its damaged condition was the value thereof reported by him, and that there was no evidence to support his finding that libellants had suffered

damages in the sum of $9,015.04, or in any other substantial amount (Record, pp. 176–8).

The exceptions were overruled, and a decree as recommended by the master, thereupon entered upon his report (Record, pp. 179, 180).

From that decree an appeal was taken to the Circuit Court of Appeals for the Ninth Circuit, and the same was there heard upon the record as made and upon the evidence introduced in the District Court and before the Master, and upon such hearing the decree of the District Court was affirmed.

Thereupon, and at the same term in which its judgment was rendered, a stay of proceedings was duly obtained from the Court of Appeals to enable your petitioner to present its petition to this Honorable Court for the writ of *certiorari*, which writ was ordered to be issued (Record, pp. 225–6).

Errors Assigned by Appellant.

I.

The order overruling claimant's exceptions to the said several libels, and particularly the following exceptions thereto, to wit: "First exception. For that the said libel and each of said libels shows that libelant and each of said libelants has no cause of action against and no lien upon the said steamer 'Queen of the Pacific,' otherwise called 'Queen,'" was and is, and is here assigned as, error.

II.

The order overruling claimant's exceptions to the said several libels and particularly the following exceptions thereto, to wit: "Third exception. For that the cause and causes of action set forth in said libel and in said libels, each, every and all thereof, is and are in said libel, and in said several libels shown to

have been waived and abandoned by each of said libelants respectively and prior to the filing of the said libel and libels herein under the provisions of a special contract made in that behalf by each of said libelants with the said Pacific Coast Steamship Company, as in said libel alleged," was and is, and is here assigned as error.

III.

The order overruling claimant's exceptions to the said several libels and particularly the following exception thereto—to wit : " Fourth exception. For that said libel and each of said libels shows that the demand and demands asserted therein and thereby is and are and each of them is and all of them are stale neglected and legally abandoned, and are barred by virtue of the laws of the State of California relating thereto, to wit, sections 337 and 338 of the C. C. P., and secs. 2174, 2909 and 2911 of the Civil Code of said State," was and is, and is here assigned as, error.

IV.

The order overruling claimant's exception to said several libels, specified as follows : " And further excepting to said libel and said libels, claimant alleges that this court has not jurisdiction in the matters alleged because said steamship ' Queen of the Pacific,' otherwise called ' Queen,' etc., etc., was not when said libel and said libels were filed in this court, within the northern district of California, or within the jurisdiction of this honorable court," was and is, and is here assigned as, error.

V.

The order overruling claimant's exception to said several libels, specified as follows : " And further excepting to said libel and said libels claimant alleges

that said steamship was not attached by the marshal upon process issued in this proceeding until the 4th day of May, 1892, more than four years after the alleged injury and injuries complained of, prior to which time any lien theretofore existing upon said steamer by reason of any of the matters alleged in said libel and said libels had expired by special contract alleged, and by operation of law," was and is, and is here assigned as, error.

VI.

The Court erred in overruling claimant's objection to the following questions propounded at the trial by proctor for libellants to the witness Abraham Haas, and in admitting in evidence, and considering upon the question of damages, the testimony of said witness, and in refusing to strike out portions of the testimony of that witness when moved thereto by claimant, all as more particularly hereinafter specified—to wit: The witness Abraham Haas, called for libelants, had testified on behalf of libelants, that he was, on the 27th day of April, 1888, a member of the firm of Hellman, Haas & Co., merchants; that that firm was then composed of H. W. Hellman, Jacob Haas, witness, and J. Baruch; that Jacob Haas died in June or July, 1889; that he (witness) was in this city when the steamer 'Queen'" sailed on the voyage in question; that his firm had merchandise on that steamer, consigned to his firm at Los Angeles; that a paper shown witness and marked "merchandise on steamer 'Queen'" was "either the bill or a copy of the bill which we handed to Gutte & Frank for the goods shipped on the "Queen;" when the following questions were propounded to witness by Mr. Andros:

"Q. Do you know what goods were shipped on board of her?

"A. I know by the bills.

"Q. Please to state. Refresh your memory from that paper and state what they were.

"MR. TOWLE: I object to any testimony from that paper.

"MR. ANDROS:

"Q. In whose handwriting is that?

"A. This is in the handwriting of a clerk of ours who was with us then, and who is with us now in Los Angeles.

"THE COURT:

"Q. Do you know anything about that paper yourself?

"A. Nothing more than I told the young man to make it out at the time. He made it under my supervision. * * *

"MR. ANDROS:

"Q. I will ask you to see, as I read this, whether it corresponds with what is on the back of this bill of lading. 50 cases of canned vegetables.

"MR. TOWLE: We object to that as irrelevant, immaterial and incompetent, whether it agrees with the memorandum or not.

"MR. ANDROS: I propose to prove the cost price of these goods by Mr. Haas, and I want to simply indetify these goods by that memorandum so that he may testify as to the cost.

"MR. TOWLE: So far as it has a bearing upon the question of price—if the witness proposes to testify from that memoranda as to prices, we shall object to that. We object to these questions. If the witness is to testify, he can as well testify from the items on the bill of lading as from a memorandum which agrees with those items.

"THE COURT: His memorandum probably has the prices attached.

"MR. ANDROS: Yes, sir.

"Q. 50 cases of canned vegetables; what was the price of this, Mr. Haas?

"MR. TOWLE:

"Q. Are you testifying from your memorandum or from your own knowledge?

"A. I am testifying from the memorandum.

"MR. ANDROS:

"Q. Did you at the time know the cost of these goods?

"A. Yes, sir.

"Q. Did you buy them?

"A. Yes, sir.

"Q. Bought them yourself here?

"A. Either bought them myself or they were bought under my supervision.

"Q. So at that time you did not know what they cost?

"A. Yes, sir.

"Q. Did you subsequently instruct that momorandum of that cost be made?

"A. Yes sir.

"Q. At the time that you made that memorandum yourself, or had it made under your supervision, were the figures therein mentioned the true cost of those goods?

"A. Yes, sir.

"MR. TOWLE: We asked that that answer be stricken out. We object to that as irrelevant, immaterial and incompetent testimony; that the witness cannot prove these values by some figures appearing on a paper. * * * We submit that the only memorandum that can be used is one made by himself at the time. * * *

"THE WITNESS): It was our bookkeeper. * * *

"MR. ANDROS:

"Q. With reference to the time these goods were shipped, when was this memorandum made?

"A. I suppose immediately after the ship went down.

"THE COURT:

"Q. I understood you to say that you knew that the charges there were correct at the time?

"A. Yes, sir.

"Q. At that time?

"A. They were made from the invoices—copy of the invoices.

"MR. TOWLE:

"Q. Mr. Haas, did you compare that memorandum with the invoices after it was handed to you?

"That I am not sure of, but I imagined that I did. * * *

"Q. Hellman, Haas & Co. still exists.

"A. Their successors exist.

"Q. Their books of accounts at that time still exists?

"A. I think they do.

"Q. You know from whom these books were bought?

"A. Yes, sir; they can be dug up if the books and papers are not destroyed. * * *

"MR. TOWLE: We submit that this memorandum is not the best evidence.

"THE COURT: I think it comes within the rule that, where a person knows the correctness of a book, he may refresh his recollection, although the entry may not have been made by him. Motion to strike out denied.

"MR. TOWLE: Save an exception."

And appellant here specifies the ruling of the Court last aforesaid as error.

"MR. ANDROS:

"Q. What was the cost price of the 50 sacks of canned vegetables?

"MR. TOWLE: We object to that question because the answer will be based upon that memorandum which the witness holds in his hand.

"THE COURT: Objection overruled.

"MR. TOWLE: Exception."

And appellant here specifies the ruling of the Court last aforesaid as error.

"A. 100 dozen asparagus * * * $175.

"Q. 250 kegs of nails. * * *

"MR. TOWLE: We object to that question so far as it is based on that memorandum. It is understood that all these questions are objected to, and exceptions saved."

The witness thereupon, in response to questions by Mr. Andros, proceeded to testify from said memorandum that the cost of 250 kegs of nails was $775; 400 sacks of rice, $2,100; 20 packages of tea, $86.40; three barrels of currants, $66.55; 420 mats of rice, $861; 250 barrels of sugar, $4,921.09; 100 half barrels of sugar, $944.39; 10 cases salad oil, $90; 35 cases of pickles, $132.50; and 13 cases of drugs, $63.20.

And appellant here assigns the ruling of said Court, and the admission of the testimony of said witness as to the cost of each and every of the aforementioned items, as error.

VII.

Mr. E. W. Newhall was called as a witness for libelants. On behalf of libelants, he testified that he was in April, 1888, a member of the firm of Newhall Sons & Co., auctioneers; that he remembered that goods were landed from the steamer "Queen of the Pacific" at the sea wall in a damaged condition; that his firm sold such goods at public auction; that he sold some of those goods for Hellman, Haas & Co.; that his firm catalogued and advertised the goods; that he had and produced a catalogue used at the sale.

"MR. ANDROS:

"Q. Are you able to state what goods you sold for Hellman, Haas & Co.?

"A. Identify them by the catalogue?

"Q. Yes, sir.

"MR. TOWLE: We object to that as irrelevant, immaterial and incompetent. Whatever goods he may have sold for Hellman, Haas & Co. is immaterial from any view of this case. * * * It does not tend to show the actual value of the goods; * * * they must prove the damage by some source which goes to the condition.

"THE COURT: Overrule the objection.

"MR. TOWLE: Save an exception."

And appellant here assigns the ruling of the Court last aforesaid as error.

"MR. ANDROS:

"Q. What were the articles that you sold in a damaged condition from the steamer 'Queen of the Pacific' that belonged to, or were marked, 'Hellman, Haas & Co.?'

"A. They were marked 'H., H. & Co.' Are those the ones you want?

"Q. Yes; what were they?

"A. There were 420 mats of rice; 400 sacks of rice; 250 kegs of nails.

"MR. TOWLE: This is all understood to be subject to the objection?

"THE COURT: Yes, sir.

"THE WITNESS: 20 packages of tea; 13 boxes of drugs; 10 cases of chow-chow; 25 cases of pickles; 50 cases of asparagus; 10 cases of Lucca oil; 250 barrels sugar; 100 half barrels sugar; 3 barrels currants. That is all.

"MR. ANDROS: Did you at the time of this sale, or about that time, notice the condition which the packages were in, with reference to being wet?

"A. I don't remember, it is so long ago. The goods were damaged; that I remember very distinctly.

"Q. What did these articles bring; what was the gross sale?

"MR. TOWLE: We object to that as irrelevant, immaterial and incompetent and not tending to prove the damage to the goods.

"THE COURT: Overrule the objection.

"MR. TOWLE: Exception."

And appellant here assigns the ruling of the Court last aforesaid as error.

"A. The gross sales were $1,262.20.

"MR. ANDROS:

"Q. What was the net?

"A. $1,190.09."

Libelants thereupon rested their case.

VIII.

The order overruling and denying the motion of claimant, made when libelants had rested their case, that a nonsuit be granted or that said libels be, severally, dismissed, was error; said motion being made upon the following grounds:

FIRST. That it does not appear that the vessel was within the district at the time the libel was filed, and, therefore, the Court was without jurisdiction of this proceeding at the inception thereof.

SECOND. That this proceeding is based upon contracts, bearing date April 26, April 27, April 28 and April 30, 1898, and which are made a part of the several libels, which contracts provide as follows: "It is expressly agreed that all claims against the P. C. S. S. Co. * * * for damage to or loss of any of the within merchandise, must be presented to the company within thirty days from date hereof; and that after thirty days from date hereof, no action, suit or proceeding, in any court of justice shall be brought against said P. C. S. S. Co. * * *

for any damage to or loss of said merchandise; and the lapse of said thirty days shall be deemed a conclusive bar and release of all right to recover against said company * * * for any damage or loss," and there being no allegation in the libel, and no proof made at the trial, that such claim had been made by libelants, or by either of them, within such thirty days, or at any time prior to the 28th day of April, 1892. And it appearing that libelants severally had knowledge of the condition of their merchandise, and of all the facts necessary to enable libelants to make, and that they were, severally able to make, a full and complete performance of such stipulation of said contracts, at least twenty (20) days prior to the expiration of said thirty days.

THIRD. That there is no proof that claimant, The Pacific Cost Steamship Company, or that the officers or crew of the steamer "Queen," the servants of the steamship company, *or that the officers or crew of the steamer "Queen," the servants of the steamship company,* have been, or were, guilty of any negligence in the premises.

And appellant here assigns the order of the court overruling and denying said motion, as error.

IX.

The Court erred in sustaining the objection of libellants to the following question propounded to the witness Abraham Haas, that is to say:

"MR. TOWLE:

"Q. The merchandise in this case was insured?

"MR. ANDROS: I object to that question as immaterial, incompetent and irrelevant, in every respect. * * *

"THE COURT: I sustain the objection.

"MR. TOWLE: I will take an exception."

And appellant here assigns the ruling of the Court last aforesaid as error.

X.

Mr. A. H. Evans was called as a witness for claimant, and in response to questions by proctor for claimant testified that he was employed by Goodall, Perkins & Co. in the year 1888, and prior to that time, as correspondent and general secretary; that he would open any complaint that might come addressed to Goodall, Perkins & Co., any letters or complaints with reference to the manner in which the business of the Pacific Coast Steamship Company is conducted.

"MR. TOWLE:

"Q. Within your observation has any shipper made any protest against, or by reason of what is known as the clause, or 30-day clause, contained in the shipping receipts in use for that company?

"MR. ANDROS: If your honor please, we object to that as incompetent and immaterial. * * *

"MR. TOWLE: We show that this is the shipping receipt in common use, as appears here. * * * Then we show that no shipper has ever objected to the contract upon that ground that it did not give him a reasonable time within which to present his claims in the event of loss. And we say that that is a circumstance going to show the reasonableness of this contract; that it is in general use and accepted by everybody as furnishing a reasonable time.

"THE COURT: I think, Mr. Towle, that if this were a suit against the Pacific Coast Steamship Company * * * that the evidence would be admissible. But if I remember correctly, I held that this suit was against the steamship 'Queen.' * * * I think I s hall have to rule that the

evidence is not proper here, and sustain the objection.

"MR. TOWLE: We take an exception."

And appellant here assigns the ruling of the Court last aforesaid as error.

XI.

The court erred in its conclusion that this proceeding is not a suit or proceeding against the Pacific Coast Steamship Company, or its stockholders, within the true intent and meaning of the following provisions of the contract alleged in the several libels; to wit:

> "The within goods are shipped and received subject to the following conditions: * * * it is expressly agreed that all claims against the P. C. S. S. Co., or any of the stockholders of said company, for damage to or loss of any of the within merchandise, must be presented to the company within thirty days days from date hereof; and that after thirty days from date hereof, no action, suit or proceeding, in any court of justice, shall be brought against said P. C. S. S. Co. or any of the stockholders thereof, for any damage to or loss of said merchandise; and the lapse of said thirty days shall be deemed a conclusive bar and release of all right to recover against said company, or any of the stockholders thereof, for any such damage or loss."

XII.

The Court erred in its conclusion that claimant was not, and is not, in this proceeding, entitled to the benefit of the sttpulations in its behalf, contained in the contracts in the libels herein alleged.

XIII.

The Court erred in excluding from its consideration and in refusing to claimant the benefit of, the stipulation of the several contracts in the libels herein alleged, reading as follows:

> "The within goods are shipped and received subject to the following conditions: * * * The company shall not be held responsible for any damage or loss resulting from * * * accident to or from machinery, boilers or steam, or any other accident, or dangers of the seas, rivers, roadsteads, harbors or of sail or steam navigation of what nature or kind soever."

XIV.

The Court erred in excluding from its consideration, and in refusing to claimant the benefit of, the stipulation of the several contracts in the libels herein alleged, reading as follows:

> "The within goods are shipped and received subject to the following conditions: * * * It is agreed that, in settlement of any claim for loss of or damage to any of the within-mentioned goods, said claim shall be restricted to the cash value of such goods at the port of shipment at the date of shipment; * * * that all claims against the P. C. S. S. Co. * * * for damage to or loss of any of the within merchandise must be presented to the company within thirty days from date hereof, * * * and the lapse of said thirty days shall be deemed a conclusive bar and release of all right to recover against said company * * * for any such damage or loss."

XV.

The Court erred in rendering judgment in favor of libellants contrary to the following express stipulation of the contracts by them alleged, to wit:

> "The within goods are shipped and received subject to the following conditions: * * * The company shall not be held responsible for any damage or loss resulting from fire at sea or in port, accident to or from machinery, boilers or steam, or any other accident, or dangers of the seas, rivers, roadsteads, harbors, or of sail or steam navigation of what nature or kind soever. * * * It is agreed, that in settlement of any claim for loss of or damage to any of the within-mentioned goods, said claim shall be restricted to the cash value of such goods at the port of shipment at the date of shipment. * * * It is expressly agreed that all claims against the P. C. S. S. Co. or any of the stockholders of said company, for damage to or loss of any of the within merchandise, must be presented to the company within thirty days from date hereof; and that after thirty days from the date hereof, no action, suit or proceeding, in any court of justice, shall be brought against said P. C. S. S. Co. or any of the stockholders thereof, for any damage to or loss of said merchandise; and the lapse of said thirty days shall be deemed a conclusive bar and release of all right to recover against said company, or any of the stockholders thereof for any such damage or loss."

XVI.

The Court erred in its conclusion that the cause of action in the libels herein alleged is for a breach of contract.

XVII.

The Court erred in its conclusion that the cause of action in the several libels herein alleged is not based upon an alleged tort, to wit, upon negligence, as distinguished from a breach of, or a failure to perform, the stipulations of the contract alleged.

XVIII.

The conclusion that the several causes of action in the libels herein alleged were not severally barred by the provisions of Section 337 of the Code of Civil Procedure of the State of California was and is, and is here assigned as, error.

XIX.

The conclusion that the several causes of action in the libels herein alleged were not severally barred by the provisions of Section 338 of the Code of Civil Procedure of the State of California was and is, and is here assigned as, error.

XX.

The finding that libelants, severally, had not been guilty of laches, and the conclusion that the several causes of action in the libels herein alleged were not, severally, barred by laches on the part of libellants, severally, and by such delay in the prosecution of the several suits as constitutes, and is, a bar to a recovery in a court of admiralty, was and is,and is here assigned as, error.

XXI.

The finding and conclusion that the failure of libellants to present their claims for damage to the

Pacific Coast Steamship Company within thirty days from the dates of said several contracts, respectively, had not operated to release, and did not release, to claimant, all their, libellants', rights to recover damages in this proceeding, was and is, and is here assigned as, error.

XXII.

The Court erred in its conclusion that the "negligence of said steamship company, its officers and servants," had contributed to, or had occasioned, the damage to the merchandise, as in said libels alleged.

XXIII.

The Court erred in its conclusion that the damage to said merchandise was not occasioned by a peril of the sea.

XXIV.

The Court erred in its conclusion that the damage to such merchandise was not the result of accident.

XXV.

The Court erred in its conclusion that the negligence of claimant, its officers or servants, occasioned, or contributed to, the damage of said merchandise.

XXVI.

The finding of the Court that an open deadlight on the steamer "Queen" was the occasion of the damage to said merchandise is without any evidence to sustain it, and is contrary to the evidence, and was and is, and is here assigned as, error.

XXVII.

The Court found that the steamer "Queen" was seaworthy when she sailed on the voyage in question, and, further, that the evidence tended to disprove any negligence of officers or crew on the voyage, and then adjudged, upon those facts, that claimant is liable in damages; and such judgment appellant here assigns as error.

XXVIII.

The finding of the Court that the insurance company—Magdeburg General Insurance Company—had paid the loss sustained by the goods shipped by Hellman, Haas & Co. is without evidence to sustain it, and was and is, and is here assigned as, error.

XXIX.

The finding of the Court that the insurance company—Madgeburg General Insurance Company—had become subrogated to the rights of Hellman, Haas & Co. during the lifetime of all the partners, or at all, is without evidence to sustain it, and was and is, and is here assigned as, error.

XXX.

The finding of the Court that this proceeding was and is instituted, prosecuted and maintained, by the insurance company—Madgeburg General Insurance Company—is sustained by the evidence, and the judgment entered herein in favor of the surviving partners of the firm of Hellman, Haas & Co.—to wit, in favor of A. Haas, J. Baruch and H. W. Hellman—is a judgment in favor of persons who are not parties to this proceeding, and was and is, and is here assigned as, error.

XXXI.

The finding of the Court that the Madgeburg General Insurance Company has a right to maintain this proceeding in the names of the surviving partners of the firm of Hellman, Haas & Co.—to wit, in the name of A. Haas, J. Baruch and H. W. Hellman—is without evidence to sustain it, and was and is, and is here assigned as, error.

XXXII.

The interlocutory judgment or decree of the Court entered herein was and is error.

XXXIII.

The order referring the cause to the Commissioner to take testimony concerning, and to report the sum of, the damage to said merchandise, was and is, and is here assigned as, error.

XXXIV.

The ruling of the Commissioner upon the offer of Mr. Andros, and the objection thereto on behalf of claimant, as follows, to wit:

> "Mr. Andros offered in evidence the testimony of Abraham Haas, taken in court upon the hearing of this cause, or so much of it as related to the question of damages, as the same appears on pages 7 to 17, inclusive, of the testimony on file in this cause.
>
> "Mr. Towle: I object to the testimony of Mr. Haas on the question of damages being received, upon the ground that the witness appears to have no knowledge of the market value of the merchandise, the damage to which is in controversy in this

proceeding; and on the further ground that all the statements of the witness relating to the merchandise in question, particularly in relation to any value stated by him of such merchandise, were hearsay and irrelevant, immaterial and incompetent and inadmissible.

"Objection overruled and evidence introduced."

was and is, and is here assigned as, error.

XXXV.

The order and decree of the Court confirming the acts of said Commissioner in the premises, last aforesaid, was and is, and is here assigned as, error.

XXXVI.

The ruling of the Commissioner upon the offer of Mr. Andros, and the objection thereto on behalf of claimant, as follows, to wit:

"Mr. Andros then offered in evidence the testimony of E. W. Newhall, taken in court upon the hearing of this cause, as the same appears on pages 23 to 27, inclusive, of the testimony on file in this cause.

"Mr. Towle: Objected to, first, upon the ground last stated in the previous objection, next upon the ground that it appears from the testimony of this witness that he had no knowledge of the quality or market value of any of the merchandise in question; nor did he have any knowledge of the extent of the damage, if any, which the merchandise sustained at the time to which his testimony refers, nor did he have any knowledge of the market value of the merchandise, or of any thereof, in the condition in which the same was at the time to which his testimony relates. And upon the

further ground that his testimony is irrelevant, incompetent, inadmissible and hearsay.

"Objection overruled, and evidence admitted and introduced. Mr. Andros then rested."

was and is, and is here assigned as error.

XXXVII.

The order and decree of the Court, confirming the acts of said commissioner in the premises last aforesaid, was and is and is here assigned as error.

XXXVIII.

The Court erred in confirming the report of the commissioner, J. S. Manley, in favor of A. Haas and others made and filed herein on the 13th day of September, 1897, and in overruling each of the following exceptions of claimant thereto—to wit:

"First. Because said commissioner hath not, in his said report, found and reported that no damages had been proven to have been sustained by said merchandise, or any thereof, by the evidence produced before him.

"Second. Because said commissioner hath found and reported that the market value of the merchandise referred to in the libel was at, or near to, the time of shipment thereof the sum of $10,203.13, when the evidence presented to him, and reported by him, was not and is not sufficient to show that such sum, or that any material part of such sum, was then the market value, or the then cash value, of the same, or of any thereof.

"Third. Because said commissioner hath found and reported that said merchandise was damaged, and that the market value of the said merchandise

in its damaged condition was the net sum realized at the auction sale thereof of Newhall & Co., amounting to the sum of $1,190.09 only, when the evidence presented to him, or reported by him, was not, and is not, sufficient to sustain such finding and report in any material particular.

" FOURTH. Because the report of said commissioner is based upon what he conceived to be the market value of the said merchandise at the place of shipment, the date of shipment; whereas, by the contract alleged in the libel, it is expressly agreed that, 'in settlement of any claim for loss or damage to any of the within-mentioned goods, said claim shall be restricted to the cash value of such goods at the port of shipment at the date of shipment.'

" FIFTH. Because said commissioner hath found and reported that the amount of damage to said merchandise is the difference between two sums stated by him—to wit, between the sum of $10,205.13 and the sum of $1,190.09; that is, $9,015.14—when there was no evidence presented to said commissioner, or reported by him, which showed, or which tended to show, or which shows, any damage to said merchandise, or to any thereof.

" SIXTH. Because said commissioner hath not found and reported that no damage to said merchandise had been proven by the evidence presented to and reported by him.

" SEVENTH. Because the testimony of Abraham Haas produced before and received and considered by said commissioner was not competent, or relevant, or material, or admissible, to show the cash value or the market value of said merchandise, or of any thereof, and was all secondary and hearsay, and not the best evidence of the market value, or the cash value of the merchandise, either sound or damaged.

"EIGHTH. Because the testimony of Abraham Haas produced before and received and considered by and reported by said commissioner did not, and does not show, or tend to show, the extent or amount of damage, if any, to said merchandise, or to any thereof, and the same, and all thereof, was inadmissible, incompetent, secondary and hearsay.

"NINTH. Because the testimony of E. W. Newhall produced before and received and considered by, and reported by, said commissioner was not and is not competent, or relevant, or material, or admissible, to show the market value of or the cash value of or the damage to said merchandise, or any thereof, at any time, either sound or damaged; and such testimony was not the best evidence to prove damage to, or the value of, such merchandise, either sound or damaged.

"TENTH. Because said Abraham Haas was not a competent witness to testify to any fact relating to value of, or to damage to, said merchandise, or any thereof.

"ELEVENTH. Because said E. W. Newhall was not a competent witness to testify to any fact relating to the value of, or to the damage to, said merchandise, or any thereof.

"TWELFTH. Because said commissioner hath found and reported that damages in the sum of $9,015.04 had been sustained by Hellman, Haas & Co., when there is no evidence reported by him to sustain such finding and report.

"THIRTEENTH. Because said commisaioner hath not found and reported in favor of claimant—that is, that no claim for damage has been sustained upon the stipulation of the contract set forth in the libel, as follows: 'It is expressly agreed that all claims against the P. C. S. S. Co. * * * for damage to, or loss of, any of the within merchandise must be presented to the company within

thirty days from date hereof, * * * and the lapse of said thirty days shall be deemed a conclusive bar and release of all right to recover against said company * * * for any such damage or loss.' "

XXXIX.

The Court erred in confirming the report of the Commissioner J. S. Manley in favor of Bancroft-Whitney Co., a corporation, made and filed herein on the 13th day of September, 1897, and in overruling each of the following exceptions of claimant thereto, to wit:

"FIRST. Because said commissioner hath found and reported that damages in the sum of $200 have been sustained by Bancroft-Whitney Co.

"SECOND. Because said commissioner hath not found and reported in favor of claimant—that is, that no claim for damage has been sustained, upon the stipulation of the contract set forth in the libel, as follows: 'It is expressly agreed that all claims against the P. C. S. S. Co. * * * for damage to or loss of any of the within merchandise must be presented to the Company within thirty days from date hereof, * * * and the lapse of said thirty days shall be deemed a conclusive bar and release of all right to recover against said company * * * for any such damage or loss.' "

XL.

The Commissioner J. S. Manley erred in receiving in evidence, over the objection of claimant interposed thereto, as specified in his report filed herein on the 13th day of September, 1897, the testimony of Abraham Haas as to the cost of said goods, as showing or tending to show the "cash value" of such goods at the

port of shipment at the date of shipment, and in considering such evidence and in finding thereon that the market value of the goods was the sum testified to by said Abraham Haas.

XLI.

The Court erred in confirming the ruling, and the finding of the Commissioner J. S. Manley in the particulars last aforesaid.

XLII.

The Commissioner, J. S. Manley, erred in receiving in evidence, over the objection of claimant interposed thereto, as specified in his report filed herein on the 13th day of September, 1897, the testimony of F. W. Newhall, relating to the sale by him of said goods of A. Haas and others, as showing, or tending to show, the extent of the damage to said goods, and in considering such evidence and in finding thereon that the value of the said goods, in their then condition, was the net sum realized from their sale as testified by said Newhall.

XLIII.

The Court erred in confirming the ruling, and the finding, of the Commissioner, J. S. Manley, in the particulars last aforesaid.

XLIV.

The finding and report of said Commissioner J. S. Manley, that the market value of the merchandise of A. Haas and others, or of Hellman, Haas & Co., was the sum of $10,205.13 was and is immaterial and outside the issues in the libel of said A. Haas and others tendered, and is error; and the consideration of said finding and report by the Court, and its judgment in

favor of said A. Haas and others, based thereon, was and is, and is here assigned as error.

XLV.

The finding and report of the Commissioner J. S. Manley, that the damage to said goods of A. Haas and others—Hellman, Haas & Co.—was the differerence between the market value of the same as found and reported by him, and the price realized from their sale at auction, as testified by E. W. Newhall, and found by said Commissioner, and that the damage to said goods was the difference between those sums, and that claimant, or the steamer "Queen," is liable in damages to said A. Haas and others in the sum of such difference, was and is error, in view of the stipulation of the contract "that, in settlement of any claim for loss or damage to any of the within goods, said claim shall be restricted to the cash value of such goods at the port of shipment at the date of shipment."

And appellant here assigns such finding last aforesaid as error.

XLVI.

The Court thereafter, and over the exception of claimant thereto, confirmed the finding of said Commissioner last aforesaid.

And appellant here assigns the confirmation thereof by the Court as error.

XLVII.

The Court erred in rendering and entering a final decree herein in favor of A. Haas and others in the sum of $9,044.84, and costs to be taxed, or in any sum.

XLVIII.

The Court erred in rendering and entering a final decree herein in favor of Bancroft-Whitney Co. in the sum of $200.66, and costs to be taxed, or in any sum.

XLIX.

The Court erred in adjudging that said decree in favor of A. Haas and others should bear interest.

L.

The Court erred in adjudging that said decree in favor of Bancroft-Whitney Company should bear interest.

Wherefore, appellant prays the judgment of the United States Circuit Court of Appeals for the Ninth Circuit in the premises, that the decrees appealed from be reversed, and that it recover its costs herein incurred.

FIRST.

Jurisdiction.

The first question which comes up in this case is the question of jurisdiction—the question whether the suit was properly commenced. On this the facts are as follows:

On the 28th of April, 1892, the libel was filed with the clerk. By the 23d Rule of Admirality made by the Supreme Court, pursuant to law, and therefore having the force of a statute, the libellant was obliged to state what he did state in Article IV. of his libel, viz:

"IV. That said steamship is now in the Northern District of California." We shall waste no time in arguing that the Supreme Court rule will not be satisfied by this assertion, unless it is true. To insert into the rule the words "whether true or false" hardly seems a creditable contention. There being such an asservation required and it also being required that that asservation shall be true it becomes fundamental to know whether it was true or not.

That it was not true is one of the facts of this case. This is shown by two returns of the Marshal. The first return, dated May 3, 1892, is as follows (Record, p. 20):

> "After due and diligent search, I was unable to find the steamer 'Queen of the Pacific,' otherwise called 'Queen,' in my district. I return the monition unexecuted.
>
> "Dated May 3d, 1892.
>
> "W. G. LONG,
> "U. S. Marshal.
> "By A. L. FARISH,
> "Deputy Marshal."

On the 4th of May and on an alias monition the ship was seized.

So clear was the case that the Court on the motion to dismiss—on which we think we were entitled to prevail—passed upon the fact in these words (Record, p. 25):

> "The 'Queen of the Pacific,' at the time the libel was filed, was not within the Northern District of California, having departed therefrom some few hours previously. The monition was consequently returned not served."

Whereupon the learned Judge decides that:

> "The objection that the vessel was not within the jurisdiction of the Court when the libel was

> filed is immaterial. Rule 23 of the General Admiralty Rules, prescribed by the Supreme Court, provides that: 'All libels in instance causes, civil or maritime, shall state the nature of the cause, * * * and if the libel is *in rem* that the property is within the district.' The libel in this case contains such an allegation, and, for the present purpose, it must be assumed to be true."

We are at a loss to understand what these observations are intended to cover or to indicate. A fact which the rules of court, having the force of statutes, require to be stated can hardly be immaterial in the sense that it does not matter whether made or not made; nor can the Court mean to say that a false allegation just as well satisfies a rule of Court as a true one.

If it is meant that the jurisdiction over the subject arises from a general jurisdiction, and is inchoate until materialized by seizure in the district, the answer at this time would seem to be that while the Constitution gives Admiralty jurisdiction generally, the law under the Constitution confines it to ships in the district. If the ship is not in the district, there is, in that case, no admiralty jurisdiction.

To give admiralty jurisdiction, two things must concur; an admiralty court and the presence of the *res* in the district. If either fails to exist, there can be no jurisdiction. The presence of the *res* could not give jurisdiction to a state court, nor could the capacity to take jurisdiction on the happening of an event which did not happen, become the equivalent of jurisdiction in an admiralty court. The Circuit Court Judges claim jurisdiction on another ground. They say that because the United States Court sometimes refrains from issuing process and seizing in admiralty a *res* in the district and already in possession of the state courts, and still maintains jurisdiction, this justifies the taking of a jurisdiction dependent upon the possibility of an

event—the presence of the *res* in the district—an event which has not happened and may not happen. Such does not seem to be the status of the cases cited. In those cases all the requisites for jurisdiction exist, the Court capable of taking it and the presence of the *res* which is essntial to confer it. The Court may then be very properly said to have jurisdiction and refrain on well-known and peculiar grounds frmo seizing. The case now before us is a widely different case. The Court, with capacity to take jurisdiction, exists and can take jurisdiction, but not when the *res* is not in the district. It has the potentiality of jurisdiction, not jurisdiction. If the Court will pardon a homely statement, an egg basket is not a basket of eggs because it has a capacity to hold eggs.

By making Rule 23 this Court seems to have already passed on the question now before it. If the allegation in paragraph IV. had not been made the libel could not have been filed ; or, if filed, must have been dismissed.

Can the libellant be better off by stating what was false than by stating what was true?

If it be said that when the seizure took place it related back and cured the fault in the libel, let us put that idea into practical connection with these facts. Instead of the words of paragraph IV. of the libel let us say :

> "IV. That said steamship is not now in the Northern District of California but is expected here, and we intend to seize her at once."

Would this have been sufficient? If the fact as it really existed could not set the machinery of justice in motion, will a false statement do it?

This fact of a suit commenced on a false foundation, runs through the whole case and cannot be got rid of.

On this branch of it we contend that the proceedings should be dismissed. They were commenced by a

disobedience of the rule of the Court, and have been continued as if no such rule existed.

When the suit came up before the District Judge on exceptions, he found the fact unequivocally and should have given us the legal results which flow from that fact, and the suit might then have been properly commenced. Our exceptions were filed on May 16th, 1892.

It should be said in addition that the proof of facts have not changed by any evidence since presented, but rests upon the finding of the Judge cited above. Later (May 12, 1896), Judge MORROW, in his opinion (Record, p. 76) says:

> "There is testimony tending to establish the fact that the steamship was within the jurisdiction of the court when the libel was filed."

Where? In the record (p. 68), where Mr. Andros says he was "informed"—not, however, by anybody whose name was mentioned. Of course, no testimony was there admitted, except what was legal.

Indefinite hearsay as it was, it was not stated until 1896, four years after the event. Mr. Andros' "statement" is a most exhaustive statement of the absence of evidence.

Neither Court undertakes to say that the finding of Judge MORROW, when the facts were fresh, was in any way wrong.

The only argument made by the Circuit Judge is *in extenso* as follows:

> "There are numerous cases where the process in *rem* has been issued by a Federal Court where the *res* was within the hands of a State Court of co-ordinate jurisdiction. In such cases the Federal Court refused to dismiss the libel, but postponed action thereon until the proceedings in such Court of co-ordinate jurisdiction were terminated.
>
> "The E. L. Cain, 45 Fed., 367.
> "Morgan v. Sturgis, 154 U. S., 256, 279.
> "*In re* Chetwood, 165 U. S., 443, 460.
> "*In re* Johnson, 167 U. S., 120, 125.

> "It must be admitted that in such cases the *res* is as much without the jurisdiction of the Federal Court as if it were without the district."

What the Court here says "must be admitted" seems to us the very point to be argued. It is true that Mr. Justice MATTHEWS (Covell vs. Hyman, 111 U. S., 182) says: That in a case where one court already has possession "the *res* is as much withdrawn from the judicial power of the other as if it were carried physically into a different territorial sovereignty." But this does not need to be taken literally. In fact it cannot be so taken. Even in the case of "The E. L. Cain" (45 Fed. Rep., 367, 369) where this is cited as the foundation for refusal to act, the Court says: "*But* the liens set up are maratime liens, which cannot be adjudicated or passed upon by the State Courts. * * * Let the causes be retained" until the State Court has disposed of its part of the remedy.

Surely if the *res* had been carried physically into a different territorial sovereignty and was there when the libel was filed, would any one say that the causes could have been retained? The truth is, in that expression the Courts were only stating strongly a proposition which was true without excepting to be bound by such a comparison in all the possible limitations which would exist when other relations were brought to mind. Indeed, such is the character of our race that even the Court must sometimes use rhetoric to get an idea into our heads without being expected to redeem an expression as if it were an order for just so many dollars.

In the case of The Silver Prince (1 Ben., 234), cited and approved in Moran vs. Sturges (154 U. S., 256), the Court took jurisdiction over freight money in the hands of a Sheriff on a libel for wages, thus showing, as all the cases do, that through this comity of courts no prior rights are to be sacrificed.

These cases, while they show that as a matter of policy and comity between State and Federal Courts the first in possession are to be the first in action, yet such action in no way justifies the idea that the suspension of a jurisdiction, to be exercised later, is the same as the absence of a jurisdiction. Nor can language used only to convey the idea directly before the Court be so wrested as to support an idea essentiallydifferent and not the least in mind.

Miller vs. U. S., 11 Wallace, 268, 294. and
Brenner vs. Steam Tug, 4 Fed. Rep., 459,

go even further and decide that the seizure is necessary to confer jurisdiction.

In Toland vs. Sprague, 12 Peters, 300;
The Lindrup, 20 Fed. Rep., 718, and
Pinknew vs. Hungaria, 41 Fed. Rep., 109
(same case sustained 42 Fed. Rep., 510),

the Courts decide that seizure must be made within the district.

The L. X. B. (88 Fed. Rep., 290–296) was a case where a motion was made to dismiss a libel in a case where the *res* was not in the district and the libel was dismissed.

No question was ever raised as to method of procedure in determining this contention. It was decided on its merits, without objection on the part of Court or counsel. There has never been any suggestion that we did not properly raise the question.

Another aspect of this question of the acquisition of jurisdiction we will discuss later on when we come to the defenses arising out of the Statutes of Limitation.

SECOND.

The Thirty Days Conditions in the Contract.

The next questions discussed by the Circuit Court are, first, the question of the presentation of claim of loss within the thirty days limited by the contract, and, second, the question of the limitation of time for bringing suit. These two provisions of the contract are set out by the libel as part of the libellant's case, and it is contended that he cannot gainsay what he has so alleged. Had he chosen to declare on the rest of the contract, leaving us to set that up as a defense, it would leave the cause of action as passed upon by the Court. The Court refused to take our view as too technical for an objection to an admiralty pleading, and allowed the clauses to be attacked.

If those clauses, or either of them, were to be held good, it would be fatal to the case; for there is no pretense that either of them was complied with.

That compliance with each of them, if valid, was a condition precedent to enable the libellant to recover, the following cases seem to show:

Cal. S. B. of S. D. vs. Am. Surety Co., 87 Fed Rep., 118-120.
Albers vs. Western Union, 66 N. W., 1040.
Angel vs. Cunard Co., 55 Fed Rep., 1005.
Moore vs. Harris, P. C. 34; Law Times, N. S., 519.

See, also,

Sherwood vs. Ins. Co., 10 Hun, 593.
Ostrander on Insurance, Section 221.

The Court, however, held:

First, that the contract did not apply, because being made with the owners of the vessel it only protected them, leaving the maritime lien the action involving the *res* utterly unaffected by the writing between the

parties, at least so far as these clauses are concerned. This was done upon the ground that as the language only affected them and did not mention the steamer, it was to be taken most strongly against them, and was confined to actions against them, and did not apply to a claim on the ship.

Second, the Court also decided that both requirements were unreasonable and void even if the *res* could have the benefit of them.

On the first proposition the Court assumes that goods can be received under a contract with owners and that the goods can have the ship not as security for the fulfillment of the contract under which they were received, but as security for the fulfillment of a different contract. It further assumes that the conditions made with the ship owner for the use of the ship (conditions made by contract) will protect the ship owner and not the ship owner's property, the use of which is the subject of the contract. All the other property of the ship owner may be protected by this contract, but not the property the use of which is by the contract stipulated for.

Certainly, some authority ought to be found to sustain this novel idea. But the only authorities cited are those which say that a contract must be construed most strongly *contra preferentes*. But construing a contract most strongly against those who set it up has nothing to do with this idea. That applies to doubtful contracts. Does anybody imagine that the Pacific Coast Steamship Company meant by elaborate conditions to protect its other property and leave the ship, the use of which was the subject of the contract, to any other and different line of liabilities? On the other hand, does anybody imagine that the shippers of goods had any idea that they had two different contracts?

Such a construction is negatived by the rest of the opinion of the Court for the Court assumes that other conditions are applicable to this case though the condi-

tions referred to are stipulated as for the "Company" (see Record, p. 9, lines 3 to 17). The very restrictions of "damages of the seas and accident" are included in just such terms. "The *Company* shall not be held responsible * * * for damages of the seas," etc. In a word, if this idea of the Court be tenable, we were common carriers with absolutely no limiting conditions as to our liabilities (Record, p. 8—last paragraph).

No cases whatever have been cited showing the ship to have been bound by any other contract than by the one which bound the owners. Such, certainly, is not the language of other judges. Mr. Justice CURTIS in Freeman vs. Buckingham (18 How., 103) approving "The Druid" (1 Wm. Rob, 399), says:

> "I apprehend that no suit could ever be maintained against the ship where the owners were not themselves personally liable or where their personal liability had been given up, as in borrowing bonds by taking a lien on the vessel. The liability of the ship and the responsibility of the owners in such cases are convertible terms; the ship is not liable if the owners are not responsible, and, *vice versa*, no responsibility can be attached to the owner if the ship is exempt and not liable to be proceeded against."
>
> See, also, the Bold Buccleugh 2 Eng., L.E., 437.

In The Kensington (94 Fed. Rep., 885, 888) this very point was made and was disposed of as follows:

> "The proposition contended for, that the clause in question provides only for the relief of the 'shipowner or agent,' and does not inure to the benefit of the ship itself, which in this case is called upon to respond only because it is alleged the owner did not carry out its contract, seems to be without merit."

This case was decided May 25, 1899.

If our contention on this point be correct the Court below has already decided itself in error in rejecting proof that no objection was ever made by any interested party to the thirty-day clauses (see Error No. 10).

The question of the thirty days' requirement if applicable to this suit, remains to be discussed. This provision was double, or, rather, there were two provisions: first, that any claim should be presented within thirty days, and second, that suit should be begun within thirty days. As to both of these contentions, it is to be said that there is enough in the case to show that both of these conditions were part of the regular contracts entered into between the company and its customers, and the presumptions are, therefore, all in favor of the binding force. They were part of the contract of the parties, and, moreover, they were made part of the libellants' claim. Had they been omitted from the libel and pleaded in defense, the aspect of the case would have been somewhat different. Can a party be heard in contravention of his own allegation?

However that may be, the contract condition is not to be disposed of out of its own atmosphere. This was a contract to be fulfilled in the State of California. The ship was plying between California ports, and so made its voyages that ordinarily in five days the goods would be delivered.

On the question of reasonableness there is not only the consent of those interested in the particular case, together with the averment in the libel, but also the general consent of the trade which we offered to prove.

These are days of telegraphs and telephones and rapid communication, and also rapid closing up of business. It is for the interest of all that speedy action should be had.

There is no limitation which could be made which might not be at the mercy of some imaginable accident. If, on the whole, it was one which in the great bulk of cases both parties could live up to, that is

enough to prevent the Court from using the harsh remedy of breaking the contract the parties have made. We are well aware of the claim that carriers have an advantageous position which they should not be allowed to abuse. But it is gradually being understood that the lessening of their burdens means in the long run the lessening of rates of freight.

In insurance cases notice within five and ten days is deemed reasonable.

In Angel vs. Cunard Co. (55 Fed. Rep., 1005-6) BENEDICT, D. J. (1893) held reasonable "a notice to be given before the removal of the goods." "This provision," he says, "seems a reasonable one in a bill of lading."

If it is to be held reasonable that the claim must be made before the removal of the goods, can it be unreasonable that the claims should be required to be presented within thirty days after the making of a contract to be performed in five days, especially when the parties both made the contract without protest?

Skinner vs. R. I. (12 Iowa, 191).

Moore vs. Harris, P. C., 34 Law Times, 519, cited in Angel vs. Cunard Co. *(supra)*, where condition was no claim for damage paid for "unless made before goods removed."

All this reasoning applies to both conditions, but it is, of course, much stronger as to the condition for the presentation of the claim within thirty days, although the Courts below make no distinction apparently. Even if the thirty-days limitation on the suit is near the "unreasonable" line, it does not follow that the filing of a claim is an unreasonable requirement under all the circumstances.

The case of Pacific Express Co. vs. Darnell (6 S. W., 765, 766; 1887), cited by the Court, does not justify the reliance of the Court. That was a case where the express company had itself detained for fourteen days the mill machine which was to be sent to Baltimore from Texas to be repaired. The company had full

notice that the mill was stopped awaiting the return of the machine. The elements of unreasonableness are far from being the same in that case as in this.

Statutes of Limitation.

The next question to be considered is the effect of the Statutes of Limitations.

The statutes appealed to are the Statutes of the State of California, containing paragraphs (three in number), all of which, we contend, may be applicable, and one of them must be, whether we can come under its terms or not.

The first is Section 813 of the Code of Civil Procedure of the State of California, and, so far as material, reads as follows :

> " All steamers * * * are liable * * *
> 5. For non-performance and malperformance of any contract for transportation * * * between places within this State made by their respective owners, masters, agents or consignees.
> 6. For injuries committed by them to property in this State.
> Demands for these several causes constitute liens upon all steamers * * * such liens only continue in force for the period of one year from the time the cause of action accrued."

The second section appealed to is Section 335 of the Code of Civil Procedure, and reads as follows :

> " SECTION 335. The periods prescribed for the commencement of actions other than for the recovery of real property are as follows :
> " SECTION 336. * * *
> " SECTION 337. * * *
> " SECTION 338. Within three years :

"1. * * *
"2. * * *
"3. An action for taking, detaining or injuring any goods or chattels."

Section 28 of the same Code reads:

"An injury to property consists in depriving the owner of the benefit of it, which is done by * * * deteriorating or destroying it."

The third section, to which we appeal, is:

"SECTION 337. Within four years, an action upon any contract, obligation or liability founded upon an instrument in writing executed in this State."

There are some general observations, both as to the facts and as to the law, which are applicable to all three of the claims here made. *As to the facts*:

It will be seen that this was a contract made and to be performed in the State of California by and and between inhabitants of California; that the shippers were doing business in the State; that the alleged injury, and indeed the whole transaction, took place in the State. There would, therefore, seem to be the best of reasons why the laws of the State should prevail in the settlement of this controversy.

We ought also to call the attention of the Court to the fact apparent in the case that even if we admit that we have lost no testimony as to the disaster to the steamer it is quite equally apparent that we have lost all opportunity to show the nature of the damage to the merchandise, and the libellants have lost all power to legally prove it. Equity, therefore, requires the enforcement of the limitation laws.

As to the law we say:

Statutes of Limitations, when they were first enacted, were received with some disfavor, both by individuals and by the Courts. But now everybody has

become reconciled to them, and it is felt to be a necessity for the transaction of business that they should be properly enforced. So far as all questions in the United States Courts depending upon the common law form of action is concerned, it seems to be settled beyond peradventure that the law of the State governs the limitation of the time within which suit may be brought. This has been held to apply even to a case where the suit brought in the United States Court was a patent suit and could be brought nowhere else. At first, the Courts of Equity and of maritime jurisdiction took the ground that they were not bound by the Statutes of Limitation of the State where the transaction or the trial took place, and there was a very strong disposition to retain the power to make limitations as the Court should itself determine in each case. We do not say that that contention has been abandoned, but we do say that it has been so changed that the foundation on which the whole matter really rests has been more thoroughly recognized by the Courts.

A statute of limitations is an expression on the part of the community as to the way in which business should be conducted. It most deeply concerns the interests of all that there should be an end of the possibilities of litigation. What would be a just period after which suit would be incapable of commencement is a matter which enters so thoroughly into tho business of a community that they can be safely trusted with the establishment of laws to govern that question; and the courts have been more and more every year inclined to follow these expressions of opinion on the part of the States. This is true of United States Courts, where they were originally deemed not to be particularly applicable; and both Congress and the courts, in all common law cases, have determined that the statute of the State in similar case should be followed, even where the analogy is not perfect. In equity, the proceedings are so different in the different States that some doubt has been raised as to the language proper

to be used to express the opinions of the United States equity courts; but in substance the State statutes of limitations are followed about as sedulously as they are in the common law actions. In admiralty, there is no exact resemblance between any proceeding on the part of the State and the proceedings in the admiralty courts. Nevertheless, the same principle prevails that the admiralty courts will come as near as may be to obeying the will of the community in which the court is held, and over the business of which it is exercising jurisdiction.

What has especially prepared the way for this increased readiness on the part of the admiralty courts to follow the State laws has been the establishment of maritime liens by the states outside of the admiralty jurisdiction conferred by the Constitution and by Congress. While the State courts themselves have no right to enforce these maritime liens, the courts of the United States have undertaken to enforce them, and, moreover, to enforce them with reference to the Statutes of Limitation, which were annexed to the establishment of the right. It is admitted in all cases that, where the State has given a lien which had not hitherto been under the jurisdiction of the United States courts of admiralty, the limitation as to the existence of the lien has been recognized also.

To illustrate what is meant by the gradual change of opinon as to the effect of limitation laws on admiralty suits, the expression of Mr. Circuit Justice WALLACE may be taken as an indication. This will be found in Miles vs. Vivian (79 Fed. Rep., 848), decided April 8, 1897, where the doctrine is laid down in much broader terms than in the earlier cases, indicating a growth in the direction of the recognition, more fully and completely, of the obligatory force of the Statutes of Limitation. Judge WALLACE says (p. 852):

> "Statutes of Limitation are equally obligatory upon the courts of equity and courts of law in cases where the jurisdiction is concurrent. In

> such cases, courts of equity do not act so much *in analogy to the statutes as in obedience to them* (2 Story, Eq. Jur., 13 Ed., 842.) Although the ordinary chancery jurisdiction (like the admiralty jurisdiction) of the Courts of the United States cannot be abridged by state statutes, they recognize those of the state in which the court is sitting, limiting the time for bringing suits, and adopt them, if they do not act in obedience to them."

It will be noticed in very many, possibly in all the cases where the matter arose in that form, that the courts have applied the principles of the statute of limitations of the state even in cases where the form of action was different and where the analogy was by no means exact.

In Cockerill vs. Butler (78 Fed. Rep., 679), decided February 15, 1897, the one-year Statute of Limitations of Arkansas of actions on the case was to be applied to an equity suit against the directors of a United States bank. This case also cites Heddon vs. Thompson (71 Fed. Rep., 60), where the Circuit Judge (SANBORN) says:

> " If the analogous action at law against the defendant would be barred by the Statute of Limitations of Nebraska, this suit must be dismissed as against him."

The principle which underlies this case and the other cases seems to be this: That where the will of the citizens of the State has been expressed so that it will apply, although not exactly, to proceedings in United States Courts, the analogy is to be followed, or the Court will act in obedience to that expression.

This does not, under our system of laws, and under what Chief-Justice MARSHALL called "the genius of our laws," seem to be unreasonable. While we are a

homogeneous people, constituting a nation, nevertheless we have so constituted that nation that the differences arising from geographical situation, from distance and from all those things that go to make up local sentiment and feeling and action, find expression in the local laws; and justice can be done in the different communities only by a careful observance of those laws. A Statute of Limitations of six years in New England might be entirely reasonable, while in California a statute of one year might be equally reasonable, and if the two statutes were reversed as to locality they might both work injustice. If the New England statute gives too much time, that can be easily corrected, and if the California statute is too short, California also has its local means of correction. All such statutes are the outgrowth of the business conditions of the different parts of the Union, and, while it seems to create a great deal of confusion to one who takes a bird'seye view of the whole number of States, it creates no perplexity or trouble in each particular State.

These general considerations are applicable to all three of the propositions which we present to the consideration of the Court.

The first section which limits the lien to a year, is either the creation of a new lien, or it is the recognition of an old one. Probably, it does not enlarge the lien which existed under the established admiralty jurisdiction of the United States. Probably, it simply recognizes an old lien which has always existed under the admiralty jurisdiction of the courts of the United States. If it were a new lien, there is no doubt that the one year Statute of Limitations would be applicable to this case. Courts have decided that State liens, created by State Courts, are to be treated in precisely the same way as all other maritime liens, founded either upon the constitutional grant of jurisdiction or upon the wording of statutes, and these are marshalled according to the same principles, having no

fewer and no greater rights than the old original maritime liens. They are, however, governed by the Statute of Limitation embodied in the statute which creates them.

Now, the Admiralty Court proceeds, if not in obedience to the laws of the States, certainly in analogy and in deference to them; and it is admitted in these cases, by all the decisions which have been made by the Court therein that some Statute of Limitations controls. Whether it it controls by analogy or by its own force, the reasoning would seem to be that the limitation made should be that which the statutes of the State contemplated in similar cases. In recognizing the lien which already exists, the State of California, so far as transactions with regard to her own ports are concerned, has decided that statutes of limitations, or what may be called substantially statutes of limitations, shall be created of one year. Why should not the Court of the United States recognize the statute of California in such case as this, as well as recognize the statute of the State applying to actions on the case, and compare it with a suit in equity brought against the officers of a United States bank, as in the case of Cockerill vs. Butler cited above? In other words, why should the Court recognize the analogy between either of the two subsequent sections which have been quoted on account of its resemblance to the case in hand when a statute has been passed by the State to meet the very case in question? In still other words, can the State impress upon the United States Court an analogy which is complete and perfect as well as analogies which are not complete and not perfect? Can they limit the remedy directly or must they limit it indirectly?

At first there was a disposition to make the new liens created by the State statute inferior to the old system under the Constitution, when of the same character, but perhaps now it may be said that following the lead of Mr. Justice MATTHEWS in the

Guiding Star (18 Fed. Rep., 266), BROWN, J., in The Amos D. Carvel (35 Fed. Rep., 666), is right when he says: "All" (that is, all statutory and maritime liens) "are treated in this district as on the same footing."

The same Judge predicted this result in 1884 in the J. W. Tucker (20 Fed. Rep., 129, 134).

See also,

The Arctic, 22 Fed. Rep., 126–129;
The Sylvan Stream, 35 Fed. Rep., 314, 315,

where the cases are collected.

The Wyoming, 35 Fed. Rep., 548.
The Venture, 26 Fed. Rep., 285.
The Menonomie, 36 Fed. Rep., 197.
The Edith, 94 U. S., 379.
Clyde vs. Steam Transport Co., 36 Fed. Rep., 501.
The Madrid, 40 Fed. Rep., 677,

where Mr. Justice LAMAR stated the same general doctrine at length.

See, also, Brine vs. Ins. Co., 96 U. S., 629–634.

In Campbell vs. The City of Haverhill, 155 U. S., 610, it was shown that a Statute of Limitations was originally made in patent causes and was afterwards repealed. Notwithstanding this, the State statute was held applicable, because Section 721 of the Revised Statutes provides that "the laws of the several states * * * shall be regarded as rules of decision in trials at common law in Courts of the United States in cases where they apply." There are no such things as patent suits to be brought in the State Courts, and yet the analogy of the State law governed.

Equity and admiralty cases are not controlled by this statute, § 721, but are controlled by the same principle, which is, that while no State statute can curtail an admiralty or equity right, it may control the remedy. While it may be contended that many cases, notably the Key City, 14 Wall., 653, prefer to keep

control of equity and admiralty matters, in order that justice may be in complicated cases, still even those cases regard the limitation as *prima facie* good and throw on those who desire to escape it the burden of showing such facts as will justify taking the case out of the statute. In this case there are no facts justifying an extension.

The second Statute of Limitations to which we appeal prescribes the period for the commencement of actions "other than for the recovery of real property," and provides that the right to bring such an action is to cease within three years. An action for taking, detaining or injuring any goods or chattels must be commenced within three years. By way of definition as to what injury of goods or chattels means, Section 28 of the Code provides: "An injury to property consists in depriving the owner of the benefit of it, which is done by deteriorating or destroying it." Whether this provision is applicable to this case, or whether the third provision cited is applicable, is a matter which is in contention between the parties. On behalf of the libellants it is said that this is an action upon contract and therefore not within the provisions of the section which has just been cited. On our side it is contended that this cannot be an action on contract, because, if it were, it would be an action for not delivering, in good order and condition, the goods which had been received.

We think a good deal of the confusion in this case has arisen from the fact that the courts below have all throughout the case omitted to notice the distinction between the contract which was actually made and the contract which is alluded to in the cases which they cite as a justification for that conclusion.

In earlier times, the receipt which was given by a shipmaster or ship's agent was that the goods were in "good order and condition." In this case, the words on the contract are "in apparent good order, except as noted, value, weight, contents and condition of contents being unknown to said company."

Upon the first-named contract there would be no obligation on the part of the shipper to show that his goods were in good order and condition. Having receipted for the goods by the use of the words "in good order and condition," the common carrier would then have the burden upon him to show the contract fulfilled. Under the form of contract actually made in this case the shippers were under obligation to show that the goods which they put on board were actually in good condition. They have offered none. They rest not on the contract, but on the tort. Under the first form of contract the procedure was very simple. The shippers offered no proof except the bill of lading to show that their merchandise was in good condition, but presented proof of the damaged condition of the merchandise, and the burden of proof to show that it was injured by something which by the conditions in the agreement itself exempted the "Carrier," and if they failed to show that it came within the exceptions of the contract they were liable.

Both the Courts below, throughout the case, passed upon the question as if it had this old form, instead of the form which it actually took under the new contract. Under the new form of contract, in the absence of proof as to the condition of the goods, and on proof of the seaworthiness of the ship, the burden was thrust upon the libellant to prove the injury and the cause of the injury. The pleadings in the case are not under the contract, but under an allegation that the goods were injured by the negligent actions of the officers of the vessel. The contract is only inducement. It that were so, then it would clearly come under the control of the statute which has just been cited.

The Courts below say that the ship, although admitted to have been proved seaworthy (Record, p. 164) has, nevertheless, as representing the carriers, another duty in addition to that of being seaworthy, namely, the duty of being guiltless of negligence on the part of the officers. This liability is evidently not a

contract liability, because it is a liability which in this country cannot be avoided by contract. It is a liability from which no one can release the carrier and his ship—not even the Court itself. If, then, the contract has been kept and the parties have received the goods and the whole question turns on negligence on the part of the carrier, how can it be otherwise than a question of tort, at least so far as the Statute of Limitations is concerned? The statute of three years defines this case in apt words (Section 338 of the Code of California, 3; and Section 28 of same Code).

Here seems to be the "analogy" and not Section 337 which applies to an action on a contract, whereas this loss was caused by a negligence which could not be the subject of contract.

Nor can it be said that the obligation as to negligence arises out of the contract and is an incident merely. The California Statute, interpreted by the Supreme Court of that State, expressly negatives this idea. Indeed, it would be strange if we were bound by a contract on a subject where we could not make a contract.

We say that not only does the libel (Article III.) sound *in tort*, as quoted by the Court (Record, p. 216), but the case as put is one *of tort* and cannot, in view of the California Statutes, be deemed anything but a proceeding *in tort*, covered by the language and intent of Section 338 (Record, p. 12, Section 338 California Code.

On the general question, outside of its relations to California Statutes, it seems clear that such an action as this is *in tort*.

Of this opinion was the Supreme Court in the John G. Stevens (170 U. S., 113). On page 124, Mr. Justice GRAY, when it was urged upon him "that the liability of a tug for the loss of her tow was analogous to the liability of the common carrier for the loss of the goods carried," replied: "But even an action by a passenger or by an owner of goods against a carrier for

neglect to carry and deliver in safety is an action for the breach of a duty imposed by law independent of contract or of consideration, and is, therefore, founded in tort" (citing Phila. & Reading R. R. vs. Derby, 14 How., 468; A. & P. R. R. vs. Laird, 164 U. S., 393; W. U. Co. vs. M. & O. R. P. Co., 21 Fed. Rep., 896–902.

See, also, The Quickstep, 9 Wall., 665, 667, where in a similar case, though the contract of towage was alleged, the Court held the proceeding one in tort.

The Courts below, however, held that the statute, if any, which is applicable to this case is the statute which has been cited third in our list.

Limitation of Four Years.

But if the Court is right on this interpretation of the statute, although it is contrary to the interpretation given to it by the Supreme Court of the State of California—an interpretation which ought to be binding upon all courts (see Thomas vs. Pacific Beach Co., 111 Cal., 136–139; McCarthy vs. Mt. Tecarte Co., 111 Cal., 328, 340; Chapman vs. Morrill, 20 Cal., 131, opinion by Field, C. J.)—nevertheless, we have this to say: that the four years mentioned in that statute have run against this action. We have already argued the question of the presence of the RES in the Northern District of California as being absolutely essential to confer jurisdiction upon the Court. Without abating anything from the claim which we have made in this behalf, there is still another claim which can be made under this Statute of Limitation. That statute provides that no action shall be commenced after four years. It will be claimed that the four years began to run from the time of the filing of the libel, because the statute of California declares that the commencement of the suit shall date from the filing of the complaint; but the statute of California,

when it referred to the filing of the complaint as the commencement of the suit, must have meant the filing of a complaint which was in accordance with law. A complaint lacking an essential component part could not be the commencement of any suit, at least during the period when the defect remained uncured. The Court could not have had jurisdiction of this case on the 28th of April, either actual or potential, because the *res* was not within the district, and the libel could not be said to be properly filed until such was the case. The fact that there was a false assertion that the *res* was in the Northern District does not help the matter at all. Nor is there any evidence that the *res* was in the District until May 4th. Even if the Court should hold that an action could be considered as properly commenced as soon as the *res* was in the district, it could not hold that this action was properly commenced until the fourth of May. At that time, even under the farthest limit of the statutes of California, the right to bring an action had ceased. It does not seem possible to us that the Court can say that the libellant can make any progress by rea-on of an asseveration in the libel which he was required to make by the rule of Court, but which was not true.

In Bailey vs. Sundberg (49 Fed. Rep., 583, 585) the Court decided that under Rule 9 of Admiralty not only must process *in rem* be served by arresting the property, but by publication. There was no notice by publication given as required by Rule 9. Hence the proceedings did not bind the *res*, but only the parties, either nominal or participant, by appearing on the record, and engaging, as they must have done, actively in the defense. It was in effect a suit *in personam*.

If Rule 9 must be obeyed, why must not Rule 23? If disobedience of Rule 9 changes an action from *in rem* to *in personam*, and binds parties solely because they appeared and took up the burden, does not disobedience of Rule 23 at least make the cause com-

mence with the seizure and not with a void or voidable procedure?

Baily vs. Sundberg proceeds upon the basis that "the rule has the force of a law of Congress" (p. 585).

As to the Merits of the Case.

Two questions seem to arise upon the merits of the case, mainly growing out of the troublesome question as to where the burden of proof rests at certain stages of the hearing. Originally, the form of a bill of lading admitted that the goods were received "in good order and condition," and in that case the presumption naturally arose that the goods were in good order and condition, or otherwise they would not have been so receipted for. Later, it became evident, especially in the case of general shippers, that this method of receipt was too binding upon the common carriers, and the language of the receipt was, therefore, changed.

In this case, the language of the receipt was: "In apparent good order, except as noted, value, weight, contents and condition of contents being unknown to the said Company." It seems to us that the courts below have throughout this case made confusion between these different forms of bills of lading and have treated this case as if it came under the ancient form of receipt; but it will be noticed that the receipt says only "apparent good order," which certainly must mean something different from "good order and condition," as used in the old form of receipt, especially with full disclaimer as to "contents and condition of contents." The ship owner, under the ancient form of contract, having acknowledged receipt of the goods in "good order and condition," there remained only on the part of the shipper an obligation to show that the goods were damaged. Our contention is that, in cases where goods are received under such limitations as were made in the contract in this case, the bill of

lading is not proof sufficient for the shipper to rest his case upon, and he must offer proof as to what the contents were of the various packages, the condition of contents and the condition generally. If he shows that, and then shows the damage to the goods, he is in the same position and occupies the same status that the shipper did who had a receipt which certified that his shipments were in good order and condition. In this case no proof whatever was offered as to the condition of the contents or as to the weight or (as we shall contend on another point) as to the value. Therefore, no case has been made out at the inception.

Upon this point the cases are so numerous that one hardly knows where to begin.

The 5th Am. and Eng. Encyc. of Law (2d Ed., pp. 533–4) lays down the law in such cases as follows:

> "There is no presumption that the goods were in good order when received by the carrier" (citing Marquette, etc., vs. Kirkwood, 45 Mich., 51; Smith vs. New York, &c., R. R. Co., 43 Barb., 225).

The fourth volume of the same work, page 523, says:

> "A bill of lading which acknowledges the receipt of a specified number of packages, but contains the phrase 'contents unknown,' cannot ordinarily be evidence of what the packages contained."

Our case is still stronger, for the receipt says: "apparent good order, weight, value, contents and condition of contents unknown."

Vennard vs. Hudson, 3 Sumn., 405, 407.
The California, 2 Sawy., 12.
Hadden vs. Parry, 3 Taunton, 303.
Fassett vs. Ruark, 3 La Ann., 694.
Miller vs. Hannibal R. R. Co., 90 N. Y., 430.
See, also, Clark vs. Barnwell, 12 How., 272, 273.

The following citations show that the libellant must in such cases prove the condition of the goods :

Schults vs. The Pietro G., 40 F. R., 497.
The Andover, 3 Blatch., 303.
Nicol vs. Castle, 9 Bombay H. Ct. R., 321.
Jessell vs. Bath, L. R. Q., Exch., 207.
The Vicenzo T., 10 Ben., 228.
The Columbo, 3 Blatch., 521.
Wentworth vs. The Ship Realm, 16 La. Ann., 18.

The case on which special reliance is placed apparently by both sides is that of Clark vs. Barnwell, 12 How., 373. There the Court laid down the proposition that " the bill of lading admits that the 24 boxes were shipped in good order, and bound the respondents to deliver the same in like good order, all and every the damages and accidents of the seas or navigation of whatsoever nature and kind excepted." That was the starting point in that case. In our case that starting point was never reached, because there was neither a bill of lading admitting " good order " nor an equivalent therefor in the way of evidence as to contents and condition of contents. Had those things been established, the first part of the opinion would have been applicable. Assuming, however, that this had been done, which it had not, the main question in the case is (says the Court), " whether or not the damage in question was occasioned by one of the perils and accidents within this bill of lading—the clause relating to dangers and accidents of the sea and navigation." After the damage to the goods, therefore, has been established, the burden lies upon the respondents to show that it was occasioned by one of the perils from which they were exempted by the bill of lading. That peril we show upon proof of the stranding of the vessel, which stranding is regarded, from the facts in the case, by the Circuit and District Courts, as being the proximate cause of the injury. The case having reached this point, the language of the Court in Clark

vs. Barnwell again becomes applicable: "It is still competent for the shippers to show that it 'the peril of the sea' might have been avoided by the exercise of reasonable skill and attention on the part of the persons employed in the conveyance of the goods, for then it is not admitted to be in the sense of the law such a loss as will exempt the carrier from liability, but rather a loss occasioned by his negligence and inattention to his duty. In this state and posture of the case the burden is upon the plaintiff to establish the negligence, as the affirmative lies upon him." Then follows a quotation from Muddle vs. Stryde (9 Carr. & Payne), where Mr. Chief Justice DENMAN states the case before him very strongly, and adds "that the jury would see clearly that the defendants were guilty of negligence before they could find a verdict against them."

The condition did not change when the Court began to seek for the causes of the leakage which rendered the stranding necessary. The burden rested on the libellant to show negligence, because the seaworthiness of the vessel had been already proven in the manner suggested by Judge HOFFMAN in the case of The Compta (4 Sawyer, 377). The Court cite many cases which they regard as parallel to this and involving the same idea, where the Courts decide that the presumption of unseaworthiness can arise, even after direct proof has been made, from the circumstances attending the nature of the accident; but in all these cases, where it has been so decided, the cause of the misfortune has been discovered, and the Courts have passed upon the bearing of that discovery, and have determined that the ship was not seaworthy when she started, because of the condition of things which has been explained. In this case there has been no ascertainment of the cause of the leak which led to the stranding of the ship, and the District and the Circuit Court naturally comment upon the absence of that evidence and think that it entitles them to infer that the vessel was unseaworthy, because the claimants of the

ship did not set forth any proof, if they were able, as to what was the remote cause. The Court says: "The real and efficient cause of the leak is not disclosed by the evidence" (Record, p. 220).

But what seems to militate against such an argument is the fact that that question was not gone into for some reason entirely unknown so far as the case discloses, but the refusal to get whatever testimony they could upon that subject rests not only upon the claimant, but also upon the libellant and upon the Court.

At page 104 of the Record we find the following:

"MR. ANDROS: If you did discover (I am not asking whether you did or not) the place where the leak was, was it below the water line when the ship was on an even keel?"

The parentheses shows that he, too, was avoiding any direct testimony on the subject. Thus, it will be seen that the proctor for the libellant declined to go into that question, and the Court finally withdrew the preliminary questions which might have led to it, each party, and also the Court, being content to rest upon the presumption of law as he understood it. Under such circumstances the natural inference that the party who did not fully disclose should be made to suffer the consequences by having all probabilities taken against him, does not seem to be properly effectual, so that the case stands on the merits in this way: First, the case for the libellants has not been proved, for he has not shown whether the goods were in good order and condition, nor what the contents were. He has, therefore, failed in the foundation of his action. Second, if he had done so, the next question would be whether this loss was by peril of the sea. Damage by salt water, whether caused by stranding or not, is a peril of the sea. Stranding of a ship is certainly *prima facie* a peril of the sea. That being so, the burden rests upon the shipper to show that this ought not to be excepted out of the list of proper damage, because it was caused by

the negligence of the officers or masters of the ship. But the negligence is something which is not to be inferred; it is something which is to be proved. Some acts, at least, are to be proved from which the Court could infer negligence—some acts either of omission or commission, but no such acts have been shown.

The District Court has found (and its finding is not disturbed by the Court of Appeals) that the ship was seaworthy when the voyage commenced, and whether the accident resulted from negligence or from the lack of seaworthiness no one has shown.

It is a very different thing to infer unseaworthiness from a particular defect which is known, such as the defect involved in the case of the Edward L. Morrison (153 U. S., 199), in which the cargo was damaged by reason of the loss of the cap covering the bilge pumphole of the vessel, and where nothing is known. The defense in that case was that it was displaced by a peril of the sea. The District Court entered a decree in favor of the libellant, which was reversed by the Circuit Court. The Supreme Court reversed the decision of the Circuit Court and affirmed that of the District Court. That was a case where the Court inferred from a leak, the cause of which was disclosed, that unseaworthiness must have existed when the ship left port. No such inference, however, can be drawn where the efficient and real cause of the leak is not disclosed or gone into by either party. There is no presumption in favor of unseaworthiness, especially after seaworthiness has been proved by competent testimony. It is true that the parties saw fit not to go into the question, if, indeed, they could have gone into it (Record, p. 104). Neither, therefore, has a right to complain of the legal position in which he finds himself.

The remote cause of the damage, the nature of which is unknown, has two aspects. It either causes a suspicion of unseaworthiness or a suspicion of negligence on the part of the officers of the "Queen." Any sus-

picion as to seaworthiness has been so fully met by us that the Court (MORROW, J.) says (Record, p. 164):

> "Now, if the only presumption of negligence arising out of the damaged condition of the merchandise was that the voyage had been commenced with the vessel in an unseaworthy condition, the Court would be compelled to hold that the claimant had sufficiently answered the *prima facie* case made out by the libellants."
>
> This quotation is only part of the sentence.

There is, moreover, nothing in the opinion of the Circuit Court which disturbs this finding, except, perhaps, inferentially, in the last sentence but one of their opinion.

There remains, then, a suspicion of negligence after the voyage was begun; but as to this last, the burden must be on the libellant; and then no cause of the leak being shown by either party, the remark of Lord DENMAN, approved in Clark vs. Barnwell, comes into action:

> "If, on the whole, it be left in doubt what the cause of the injury was, or if it may as well be attributable to the perils of the sea as to negligence, the plaintiff cannot recover."

If the matter has been in absolute darkness by all parties, there can be no presumption against seaworthiness, and none in favor of negligence.

Whatever effect an unknown cause may have on seaworthiness, it can have none on negligence. That must be proved. It can have none on seaworthiness, for it has been pronounced by the Court that we have met every presumption arising from any evidence in the case, by evidence showing seaworthiness before the voyage commenced (The Edwin, 8 Fed. Rep., 540, 542).

The last sentence of the Circuit Court seems to us to make clear the error into which the Court has

fallen. "Upon all the evidence contained in the record, we are of opinion that the Court did not err in its conclusion that the burden of proof rested upon claimant to show that the leak that was the direct cause which led to the damage of the goods by sea-water occurred by danger of the sea, and that in the absence of any such proof, the presumption of law is that the damage was occasioned either from the unseaworthiness of the steamer or from the carelessness or negligence of the officers and crew on board."

It would seem that the Court erred, first, in assuming that there was any presumption of the law, in the absence of proof as to the exact nature of the cause of the leak, that either the damage was occasioned by the unseaworthiness of the steamer or by the carelessness or negligence of the officers and crew on board. Here are two different propositions: One is the unseaworthiness of the steamer, in regard to which the burden of proof is upon the claimant; and the other is the negligence of the officers, where the burden of proof is upon the libellant; and it cannot be said that, in the absence of proof, there is any presumption of the law as to the unseaworthiness of the steamer, and certainly there is none as to the negligence of the officers and crew on board. Any evidence tending to indicate unseaworthiness we have met. Negligence cannot be suspected, it must be proved; and on the whole case the libellant must sustain his claim.

On this state of the law and the facts we contend:

First. That the libellant, having offered no proof of the sound condition of the goods when received, has failed to establish even a *prima facie* case.

Second. We have shown a seaworthy condition of the vessel, and have so fulfilled our implied warranty in that regard.

This is found as a fact by the District Court

(Record, p. 164). Nor does the Circuit Court otherwise find. The Circuit Court on all the facts finds the cause of the damage unknown, and infers that the ship was unseaworthy *or* that the officers were negligent. An alternative finding of that kind is not a finding of unseaworthiness.

THIRD. As the loss was by a "peril of the seas," the burden was then put upon the libellant to prove that kind of negligence on the part of the officers which would render inoperative the exception by reason of "a peril of the sea." This must be found affirmatively.

The Court, however, have found in the alternative, either negligence *or* unseaworthiness. This is to find neither.

And how could either be found when the Court say (Record, p. 220) "the real and efficient cause of the leak is not disclosed by the evidence?" How can you infer something from nothing?

Damages.

The next contention we make in this case is that there was no evidence presented which justified the damages found by the Courts below.

The theory on which these were adjusted was that the goods were in good order and condition when received, and that, having received the goods back in damaged condition, the libellants were justified in selling them in one lot at auction without any examination or notice to us; and that, thereupon, the libellants were entitled to have of us, as damages, the difference between the proceeds of the auction sale and the cost prices testified to after the lapse of nine years, on the basis of a memorandum made by a clerk, which memorandum was made to inform the company which had insured the goods.

To this claim, sustained by the Court, there are three objections: first, that the condition of the goods when shipped was assumed and not proved; second, that the bill of lading requires the libellant to receive the "cash value at the port of shipment at the date of shipment." On this question of "cash value" no evidence was offered; evidence being presented to show the cost, and even that only from the memorandum already alluded to.

THIRD. The goods were sold at auction, without separation, in one lot, without notice and without our assent. No other testimony as to damage or value was offered.

The first suggestion we have already presented, contending that the absence of proof went to the whole case. We now present this absence of proof of condition as invalidating the estimate of damage. This suggestion and the second suggestion are amply sustained by the authorities which we cite. These authorities sustain the doctrine laid down in Fralof vs. N. Y. & H. R. R. Co., 10 Blatchford, 16, as follows:

> "Neither courts nor juries are permitted to assess values upon conjecture. They must have proof of value, or evidence of such facts as will warrant a deduction of the value with reasonable certainty."

Mr. Justice STORY, in Alfonso vs. U. S. (2 Story, 421), in discussing the term which he considered the equivalent of market value in a revenue case, laid down the principle that the market value cannot be arrived at on a mere purchase made by a single individual, or a purchase made even by a few persons; for in either case, they might have been purchased above or below the market value, or the market value might have been fluctuating.

In The H. F. Dimmock, 77 F. R., 226, Circuit Judge PUTNAM had occasion to discuss the whole question of

values, and calls attention to the fact that there are certain articles which have a recognized market value, and which do not have to be calculated upon, but which are known to the experts. With reference to this great class, to use his own expression, " the cost is no proper element, and if admitted at all in evidence, is admitted * * * for the purpose of leading up to a determination of what the market value is."

To the same end are the following cases, which are somewhat the same as the case cited from Story above :

Goodwin vs. U. S., 2 Wash., 493.
Tappan vs. U. S., 2 Wash., 327, 400.
U. S. vs. Tappan, 11 Wheat., 419.
U. S. vs. Sixteen Packages, 2 Mason, 48, 54.
Wehle vs. Haviland, 69 N. Y., 448.

The testimony of Mr. Haas, the only testimony in the case, has been already described. It related to the " cost price ", which, as the Court said in the H. F. Dimmock case, " is no proper element."

The third objection relates to the auction sale.

It is for the interest of the whole community that the value of goods which are damaged should be proved in the utmost good faith, for the goods, like the goods in this case, being turned over to the libellant and being in his sole possession, must be treated in a fiduciary way, with the utmost care and the utmost openness. No one will say that the turning over of 1,551 packages to an auctioneer, and the sale of them in one lot, is the fulfillment of the duty the libellant owed to the claimant.

The Marinin S., 28 F. R., 664, 668.
Wolf vs. The Vaderland, 18 F. R., 733, 736.
Nouson vs. Dent, 8 Moore, P. C., 419.

It is noteworthy that the only cases cited by the Courts below in support of their views of the validity of the auction sale as fixing the value of the goods alleged to have been damaged had in the facts the important element that the master had notice and

assented to the sale. This is so stated directly in the second case, and must be inferred in the first from the expressions of the Judge as to the relative duties of the consignee and the master. Here there was no notice to the master or to the claimant, and no separation of the sound merchandise from that which was damaged, and no testimony as to the damage. Even the auctioneer can only say (Record, p. 65) that the goods were damaged, but how much he did not recollect. He would not even say they were wet.

See the cases cited by the Court :

The Columbus Federal cases, 3041.
The Columbus Federal cases, 3042.

Principal Points Restated in Brief..

FIRST. That libel was never properly filed, because the *res* was not in the district when it was filed, and Rule of Court No. 23 was not truthfully complied with.

SECOND. The case comes under one of the three California Statutes of Limitations :

(a) The one year statute, which expresses exactly the limitation which the law of California desires to put upon this precise case ; or

(b) If not ; then the statute which applies to cases of tort—this cause sounding in tort ; or

(c) If the case is one of contract, then by the law of California the period of four years had elapsed between the accruing of the cause of action and the true commencement of the action, the true and proper filing of the libel, if it ever was truly and properly filed.

THIRD. On the question of the barring of the suit either by failure to make claim within thirty days, or by failure to bring suit within thirty days, that the parties having made the contract, are bound by these

stipulations, which are two in number; thirty days to make claim, and thirty days in which to bring suit; and these are independent, each standing on its own merits.

FOURTH. On the merits of the case:

(a) We contend that the bill of lading does not exempt the libellants from proof as to the condition and nature of the articles shipped, and, no proof having been offered on that subject, the libellant has failed to make out a case.

(b) We having proved the seaworthiness of the steamer, and that the loss was by a peril of the sea, the burden then fell upon the libellant, not to raise a suspicion, but to furnish proof of negligence.

(c) Negligence not being proved, the libel should have been dismissed.

FIFTH. As to the damages:

(a) The condition of the goods when received not having been proved, one essential for fixing the amount of damage was not proved.

(b) The sale by auction, with no other proof of the nature of the injury, did not furnish the other element suitable to fix the damage.

Point applicable to that part of the libel which concerns libellants Haas, Baruch & Hellman.

The Court below have decided that the Magdebourg General Insurance Company is entitled to judgment on this behalf in the name of Haas, Baruch & Hellman, surviving partners. This conclusion the Court comes to without proof or any evidence either that the goods were insured, or that the insurance company have paid the insurance. The Court even went so far as to refuse to let us ask Mr. Haas if he was insured (see error, Nos. 9, 29, 30 and 31). Either the assignment of error No.

9 is good, or those of Nos. 29 to 31 are good. If the case be claimed to be one of subrogation, surely it must be proper to ask if there was any insurance.

We have endeavored to argue the principles involved in all the errors assigned, but none of the errors are intended to be waived by any omission.

Lastly.

The decrees appealed from should be reversed with costs.

Respectfully submitted,

THOMAS B. REED,

Counsel.

Off... Court U.S.
NOV 30 1900
JAMES H. McKENNEY, Clerk

No. 130.

Brf. of Andros for Respondents.

No. 130.

Filed Nov. 30, 1900.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1900

PACIFIC COAST STEAMSHIP COMPANY,

Petitioner,

v.

THE BANCROFT-WHITNEY COMPANY and A. HAAS, J. BARUCH and H. W. HELLMAN, Surviving Partners of the Firm of HELLMAN, HAAS & COMPANY.

Libelants and Respondents.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Brief on Behalf of Libelants and Respondents.

MILTON ANDROS,
Counsel for Libelants and Respondents.

..... CO., PRINTERS, SAN FRANCISCO

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On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

MAY IT PLEASE THE COURT:

As it is improbable that counsel for respondents will, before it will have become necessary for him to prepare and file his brief on their behalf, have an opportunity seasonably to examine the brief of counsel for the petitioner, for the purpose of replying to the same, or to controvert or accede to the statement of the case therein, he deems it proper to preface this brief with a statement of the facts as he understands them to exist, and also to refer to such parts of the pleadings as may be material to an

examination of the questions of law involved in the case. He also respectfully begs leave to add, that, for like reason, he will assume that the errors to be discussed are substantially those insisted on in the Court below, as well as in the petitioner's application for the writ of certiorari and his brief accompanying the same.

STATEMENT OF THE CASE.

In the latter part of April, 1888, the libelant, Bancroft-Whitney Company, a corporation, and the libelants, Hellman, Haas & Company, shipped at San Francisco on board of the steamship "Queen of the Pacific," owned by the Pacific Coast Steamship Company, claimant herein, and by that Company employed in the transportation of cargo and passengers, certain merchandise, that of Bancroft-Whitney Company, viz: certain cases of books, to be transported to San Diego, and that of Hellman, Haas & Co., viz: 50 cases canned vegetables, etc., to San Pedro, in the State of California, to be delivered to the respective consignees named in the bills of lading.

These several contracts of affreightment are evidenced by bills of lading, copies of which are made part of the libels. (Rec., pp. 8, 14.) By these bills of lading the steamship company acknowledged to have received the merchandise in apparent good order and condition, to be transported to the several ports therein mentioned, and there to be delivered in like apparent good order and condition, except, *inter alia*, that "the Company shall "not be held responsible for any damage or loss result-

"ing from fire at sea or in port, accidents to or from "machinery, boilers, or steam, or any other accident, or "dangers of the seas, rivers, roadsteads, harbors, or of "sail or steam navigation of what nature or kind so-"ever."

On the back of these bills of lading are printed the following conditions:

"It is understood that in the settlement of any claim "for loss of or damage to any of the above-mentioned "goods, said claim shall be restricted to the cash value "of such goods at the port of shipment at the date of "shipment.

"It is expressly agreed that all claims against the P. "C. S. S. Co., or of any of the stockholders of said "Company, for damage to or loss of any of the within "merchandise, must be presented to the Company "within thirty days from date hereof; and that after "thirty days from date hereof, no action, suit or proceed-"ing, in any court of justice, shall be brought against "said P. C. S. S. Co., or any of the stockholders thereof, "for any damage to or loss of said merchandise; and "the lapse of said thirty days shall be deemed a conclu-"sive bar and release of all right to recover against said "Company, or any of the stockholders thereof, for any "such damage or loss."

(This stipulation, to avoid unnecessary repetition, will hereafter be referred to as "*the thirty-day clause.*")

On the back of the bill of lading delivered to Hellman, Haas & Company was a list of the articles shipped under it, and opposite the item "ten cases salad oil" was stamped the words "owner's risk." The bill of lading

provides that "oils" are at owner's risk of leakage. (Rec, p. 15.)

At about two o'clock on the afternoon of the 29th day of April the steamship, with the merchandise of the libelants on board thereof, departed from the port of San Francisco bound for the port of San Diego, and way ports between San Francisco and the last-named port. (Alexander, R., p. 102.)

That about thirty minutes past two o'clock, on the morning of the 30th day of April, it was discovered that the vessel had sprung a leak on her starboard side, and that water was coming into a compartment in the between decks. (Alexander, R., p. 87.) The ship at this time had a list of from five to eight degrees to starboard which, when she reached Port Harford four or five hours afterward, had increased to an angle of thirty degrees. (Alexander, R., pp. 87, 90.) After departing from San Francisco and up to this point of time the vessel had not met with heavy weather, but only with the ordinary weather usually encountered at that season of the year on the coast of California between San Francisco and San Diego. (Alexander, R., p. 97.) Nor had she, so far as appears, met with any of the excepted perils or other accident that would satisfactorily at that time, or at all, account for this leak. (Alexander, R., p. 105.)

When the leak was discovered, the vessel was about 22 miles from Port Harford, (Alexander, R., p. 105) the first place where she would, in the course of her voyage after leaving San Francisco, make a landing for

the purpose of delivering and taking on cargo and passengers. (Alexander, R., p. 98.)

The master being unable, at that time, to ascertain the exact locality of the leak or the origin thereof so as to be able to take steps to stop the same, the vessel continued, in a leaking condition, on her way to Port Harford, where she arrived, about seven o'clock on the morning of the 30th day of April (Alexander, R., p. 92), and, when about 250 or 300 yards from the wharf where she usually made her landing, took the bottom in about 23 feet of water, and, in about 20 minutes thereafter, filled, by reason whereof the cargo was submerged. (Alexander, R., pp. 88, 90.)

Before the vessel reached Port Harford men were sent over the side of the vessel to see if, in respect to the place of the leak, "they could discover anything from the outside of the ship, and they could not." (Alexander, R., p. 96.)

Along the outside of the vessel beginning at a point about 20 or 30 feet from her stern and extending to a point 20 or 30 feet from her bow and from a foot to a foot and a half above the water line, was bolted a stringer or guard that stood out from her side about 14 inches. Over this guard the sea frequently washed. (Alexander, R., p. 98.)

No examination of the side of the ship was made below this stringer, which was about 6 or 8 inches above the *dead lights*. (Alexander, R., pp. 142–3.)

It appears that when at Port Harford, the place of the leak was discovered, and that it would have been above

the water line if the vessel had been on an even keel. (Alexander, R., p. 105.)

As soon as the services of a diver could be procured, he went down to ascertain the place of the leak, and, if possible, to stop it. Having found the place of the leak and stopped it, the water was then pumped out from the hold of the vessel, and on the morning of the fourth day after the leak was first discovered, the vessel left Port Harford and returned to San Francisco, arriving there the next day. (Alexander, R., p. 97.) On the passage to San Francisco she did not leak, the cause of it having been discovered and effectually remedied at Port Harford. (Alexander, R., pp. 141-2.)

After the return of the vessel to San Francisco the cargo was discharged at the seawall, and such portions of it as were not completely destroyed, were delivered to the various shippers thereof. On the 19th day of May, that portion of the cargo belonging to Hellman, Haas & Company, was by them sold at public auction, for the benefit of whom it might concern, for the sum of $1,262.20. (Test. Haas, R., p. 60; Newhall, R., p. 62). The goods were sold on the wharf where they were delivered from the steamship. (Test. Newhall, R., p. 65.)

On the 28th day of April, 1892 (Rec., pp. 8, 14), the libelant, Bancroft Whitney Company, and libelants, Hellman, Haas & Company, verified and filed their several libels "*in a cause of contract, civil and maritime*", against the said vessel, to recover damages for the injuries to their said merchandise by reason of

its having been wet by sea water in consequences of the leaky condition of said vessel and the subsequent submersion of the cargo at Port Harford.

The contract of affreightment under which the merchandise was shipped, and the conditions thereof on the part of the carrier to be performed as evidenced by the bills of lading, are specifically set forth in the second article of the libels. (Rec., pp. 5, 11). In the third article of the libels, it is averred that the merchandise was not delivered at the ports named in the contract of affreightment in like good order and condition as when received, or at all; "but, on the contrary, said mer-"chandise was returned to said port of San Francisco in "a greatly damaged condition, by reason of having been "wet with sea water during said voyage, which by "reason of the negligence of said Steamship Company, "its officers and servants, gained access to the interior "of said ship where said merchandise was stowed, "to-wit: on or about the 30th day of April, A D. "1888"; and concluded with the usual prayer for process, etc. (Rec., pp. 5, 11, 6, 12, 13.)

On the said 28th day of April, a monition for the arrest of the vessel was, according to the course of the proceeding of a court of admiralty, issued to the Marshal, who, on the 3rd day of May following, returned the same unexecuted, not having been able, as appears from the return, to find said vessel in his district. (Rec., p. 20.)

This return, was read in evidence by the proctor for the claimants "for the purpose of showing that the day this monition was received by the Marshal the

vessel was not in the District." (Rec., p. 138.) To explain this, Mr. Farrish, a deputy U. S. marshal, was called as a witness for the libelants. From his testimony it appears that neither the date of the return of the monition nor the entry in the books of the Marshal's office, as to the day when the monition was delivered to the Marshal, was conclusive as to that fact; that, notwithstanding the date of the return and the entry in the office book as to when it was received, it might have been delivered to the Marshal on the day it was issued, April 28th. (Rec., pp. 141–2–3.)

On the 4th of said May an *alias* monition was issued, and on that day, as appears from the *amended* return of the Marshal, he duly arrested the vessel. (Rec., p. 21.)

Thereupon the Pacific Coast Steamship Company, a corporation, appeared and claimed the vessel, and filed peremptory exceptions to the libels of the several libelants. (Rec., p. 22.)

These exceptions are, in substance:

1. That the libels show that the libelants had no cause of action and no lien against the steamship proceeded against.

2 That the libels show that the causes of action alleged therein are causes of action, if any, against the Pacific Coast Steamship Company, and not against the steamship.

3. That the causes of action set forth in the several libels are shown therein to have been waived and abandoned by the libelants prior to the filing of said libel

under the provisions of a special contract made between the libelants and the said steamship company.

4. That the said libels show that the demands asserted therein are barred by virtue of Sections 337 and 338 of the Code of Civil Procedure of the State of California, and Sections 2174, 2909 and 2911 of the Civil Code of said State.

(5.) Further, that the Court had not jurisdiction in the matter because said steamship was not, when said libels were filed in said court, within the Northern District of California, and within the jurisdiction of the court.

(6.) Further, that said steamship was not attached by the Marshal upon process issued on said libels until the 4th day of May, 1892, more than four years after the alleged injury complained of, prior to which time any lien theretofore existing upon the steamer by reason of the matters alleged in the libel, had expired by special contract, alleged, and by operation of law. (Rec., p. 22.)

These exceptions were overruled by the Court. (Rec. p. 31.)

To the overruling of the first, third, fourth, fifth and sixth, claimant assigns error. (Assignments 1, 2, 3, 4, 5, Rec., pp. 181–2.)

The sections of the Code of Civil Procedure referred to in the fourth exception relate to the periods prescribed for the commencement of actions, the material parts of which are as follows:

§ 337. "Within four years: An action upon any contract, obligation or liability founded upon an instrument in writing executed in this State."

§ 338. Within three years: Subdiv. 3. "An action for the taking, detaining or injuring any goods or chattels, including actions for the specific recovery of personal property."

Those of the Civil Code referred to, relate to the obligations of common carriers and to liens in general, and are as follows:

"§ 2174. The obligations of a common carrier cannot be limited by general notice on his part, but may be limited by special contract.

"§ 2909. A lien is to be deemed accessory to the act for the performance of which it is a security, whether any person is bound for such performance or not, and is extinguishable in like manner with any other accessory obligation.

"§ 2911. A lien is extinguished by the lapse of the time within which, under the provisions of the Code of Civil Procedure, an action can be brought upon the principal obligation."

The exceptions to the libel having been overruled, the claimant made answer thereto. (Rec., pp. 31, 32 *et seq.*)

Art. II. In the second article of the answer to the libel of Bancroft-Whitney Company it is denied that on the 28th day of April, or at any time, or at any place, the libelant shipped in good order and condition, or at all, one case of books on the steamship "Queen of the Pacific," belonging to or employed by the claimant, to be transported to San Diego or elsewhere, and to be delivered in like good order and condition as when received, or otherwise, unto Bancroft-Whitney Company; denied that the claimant when it received said goods on board of the said steamship for transportation as aforesaid, entered into a contract of affreightment in writing with the libelant, wherein it acknowledged to have received the goods

in apparent good order, or otherwise, or promised and agreed to transport the goods to the port of San Diego or elsewhere, and there deliver them unto the libelant in like good order as received, certain perils in said agreement mentioned excepted, or otherwise; denied that said Steamship Company received said merchandise on board of said steamship, but the contrary; and alleges that the case of books referred to in the libel was delivered to the Steamship Company by the libelant at San Francisco, to be by that company forwarded to San Diego, same to be so forwarded at the option of the Steamship Company on the steamship "Queen of the Pacific" or any other steamship which the said company should employ for that purpose; and such delivery was made to said Steamship Company under a special contract in writing relating thereto, made on the 28th day of April, 1888, between the libelant and the said Steamship Company, which is referred to in said libel, and a copy thereof attached thereto and made a part thereof.

III. Admits that the steamship sailed from the port of San Francisco bound to the port of San Diego with the said merchandise on board; admits that the same was not delivered at San Diego; admits that the same was returned to San Francisco; admits that the same was damaged by reason of having been wet with sea water, but denies that the same was so wet during the voyage, or by reason of the negligence of the steamship company, or its officers or servants; denies that by reason of any negligence the sea water gained access to the interior of the ship where the merchandise was stowed on the 30th day of April, 1888, or at any time.

It is then denied that the vessel was within the Northern District of California when the libel was filed; that libelant has not sustained any damage; or that the premises in the libel alleged are true, except as specifically admitted to be so.

(Articles IV, V, VI.)

VII. Alleges that the contract, a copy of which is attached to the libel, is a contract between libelant and steamship company individually, and not with said company as agents of the steamship "Queen of the Pacific"; and further, that said contract was entered into in the State of California by persons resident therein, and was to be performed in said State, and the damage to said merchandise, if any, occurred in said State.

VIII. Alleges that at all the times in the libel referred to the said steamship company was the owner of said steamship; that it was engaged in carrying passengers and merchandise by water and pursuant to special contracts relating to such carriage, and during that time employed the steamship "Queen of the Pacific," and numerous other ships in performing its obligations under such special contracts; that the merchandise of the libelant was placed on board said steamship by said steamship company for carriage to its destination, pursuant to said contract with the libelant, not because such contract required it should be so placed or carried, but because it suited the convenience of the steamship company that it should be so placed and carried.

As a further and separate answer and defense, it is alleged:

I. That the steamship sailed from San Francisco about 2 o'clock P. M., on the 29th day of April, 1888, and proceeded on her voyage. No unusual incident was known to occur during the said 29th day of April, but that about 1 o'clock A. M. on the 30th day of April, she was discovered to have sprung a leak, and then proceeds to describe generally the effect of that leak, the steps taken to relieve the vessel of water, and then states that at about 7 o'clock A. M., on the 30th of April, the vessel was "run upon the beach at Port Harford," where "sea "water immediately came over her deck, and nearly filled "the vessel with water, and thereby said merchandise "became wet with sea water"; that the vessel was purposely beached to prevent the disaster from being more serious.

II. It is then averred that before the vessel sailed from San Francisco, the steamship company had exercised due diligence to make her seaworthy for the voyage, and that the merchandise of the libelants had been returned to and delivered to them at San Francisco. (Articles II and III.)

IV. 1. That the goods were received, carried and delivered in pursuance of the laws of the State of California, and the provisions of a special contract, a copy of which is attached to the libel (*i. e.* "the thirty-day clause.").

2. That the causes of action in said libel are barred by the laches of the libelant in prosecuting the same, and

refers specifically to "*the thirty-day clause*" on the back of the bill of lading, and avers that the libelant did not present to the Company within the thirty days mentioned therein its claim for damage, nor was the libel filed within said thirty days or at any time prior to the 29th day of April, 1892; that the steamship was not at that time in the Northern District of California, nor was she seized under process issued under the libel until the 4th day of May, 1892; that the merchandise was wet with sea water on the 30th day of April, 1888, and that this fact was known to the libelants prior to the first day of May, 1888.

It then alleges that the action is barred by Sections 337, 338 and 813 of the Code of Civil Procedure of the State of California, and also that the action is barred by reason of the libelant not having seasonably prosecuted his suit.

Section 813 of the Code of Civil Procedure, referred to above, is as follows:

Subdiv. 5: "For nonperformance or malperformance of any contract for the transportation of persons or property between places within the State, made by their respective owners, masters, agents or consignees;

"Demands for these several causes constitute liens upon all steamers, vessels and boats, * * * but such liens only continue in force for the period of one year from the time the cause of action accrued."

The answer to the second cause of action of Bancroft-Whitney Company is, *mutatis mutandis*, the same as that to the first cause of action, except in Article IV of the further and separate answer to the second cause of action (Rec., p. 41, Subdiv. e.), it is averred that by

reason of the delay in commencing the proceeding it would be deprived of the testimony of three witnesses, Ingraham, Esmelts and Johnson, by whose testimony it could be established to the satisfaction of the Court that the dead lights of the steamer were closed and well fastened when she sailed on her voyage. (Rec., p. 41.)

It appears from the record (p. 145) that Frank Esmelts, one of the three witnesses, was called at the trial and testified as to this matter. It does not, however, appear in the record that the testimony of the other witnesses could not have been procured. It does not appear from the record that testimony was introduced by the libelants to controvert the testimony of Esmelts in respect to the condition of the dead lights; nor does it appear that the condition of the dead lights, when the vessel sailed, was put in issue by the pleadings, or otherwise.

The answer to the libel of Hellman, Haas & Co. is, in all matters material to the present inquiry, substantially the same as the answer to that of Bancroft-Whitney Company. (Rec., p. 42 *et seq.*)

The cause having been brought on for hearing on the merits, Abraham Haas and E. W. Newhall were called as witnesses on behalf of the libelants Hellman, Haas & Co., for the purpose of proving the damages sustained by them. To the admission of the testimony of these witnesses objections were interposed by counsel for claimant, which were overruled by the Court and the testimony admitted. To the admission of this testimony the claimant assigns error. Their testimony, so far as the same

is material, will be fully set forth in connection with the examination of this assignment of error.

The examination of these witnesses being concluded, counsel for libelants announced "that under the pleadings this is our case and we rest." (Rec., p. 70.)

Thereupon counsel for claimant moved on behalf of the steamship company for a judgment of nonsuit on the grounds stated in the exceptions to the libel, and also in the answers. (Rec., p. 70.) The matter having been argued by counsel and the Court having advised thereon, denied the motion. (Rec., p. 76.)

Thereafter, such further proceedings were had that the Court ordered judgment for the libelants, with reference to the Commissioner to assess damages. (Opinion, Rec., pp. 153–171.)

Thereafter (Rec., pp. 172–3) the Commissioner, to whom the matter was referred, made and filed his report, by which it appears that he found as damages to Bancroft-Whitney Company the sum of $200 as stipulated by counsel, as appears in opening statement of counsel for libelants. (Rec., p. 53.)

On the hearing before the Commissioner in respect to the matter of the damages sustained by Hellman, Haas & Co., counsel for libelants offered and put in evidence the testimony of Abraham Haas, hereinbefore referred to (Rec., pp. 55 *et seq.*), and that of E. W. Newhall (Rec., pp. 62 *et seq.*). To these several reports of the Commissioner the claimant filed exceptions (Rec., pp. 176–7–8), the substance of which is that neither the witness Haas or Newhall were competent witnesses "to

"testify to any fact relating to the value of or damage "to the merchandise, and that the evidence was not "sufficient to sustain the report as to the finding of "damages." These exceptions were overruled and a final decree was entered in favor of the several libelants for the amounts found due to them respectively. (Rec., pp. 178-9-80.)

From this judgment the claimant appealed to the Circuit Court of Appeals for the Ninth Circuit, which affirmed the judgment of the Court below. Thereupon the claimant petitioned this Court praying that a writ of *certiorari* issue to said Circuit Court of Appeals, which was allowed, and the whole record has been brought and now is, before this Court by virtue of said writ.

Although the material questions to be discussed, as raised on the record, are few, yet fifty assignments of error are interposed, many of which are in substance but a repetition, in a different form, of the others. Those which counsel for libelant deems material will, omitting minor points, be stated and discussed under appropriate subdivisions of his brief of argument.

BRIEF OF ARGUMENT.

I.

The first exception to the answer is, in substance, "*For that the said libel * * * shows that the* "*libelant * * * has no cause of action against and* "*no lien upon said steamship 'Queen of the Pacific'.*" (R., p. 22.)

UNDER THE FACTS OF THE CASE THIS EXCEPTION CANNOT, FROM ANY POINT OF VIEW, BE SUSTAINED.

" Received of Bancroft-Whitney Co. to be shipped on " board the steamer ' Queen of the Pac.' or on board of " any other steamer of the Company, or on board of " any other steamer the Company may employ, the " following property in apparent good order * * * " " to be delivered at San Diego * * * " is, *inter alia*, the language of all of the bills of lading issued to the respective libelants. (R., pp. 8, 9, 14, 17.)

All the merchandise described in the several bills of lading was delivered to and received by the Steamship Company for shipment, and was by it shipped on board of the steamer " Queen of the Pacific" for transportation according to the terms of the bills of lading. The fact that the Company was privileged to ship the merchandise on some other vessel, owned or employed by it, does not affect the legal rights of the consignors as to a lien on the carrier ship, or otherwise. Forty years ago it was determined by this Court in *Bulkley* v. *Naumkeag Steam Cotton Co.*, 24 How.. 386, 391-2-3-4, that the delivery of merchandise to the carrier to be by him shipped upon a partic ular vessel, gave rise to a lien on that vessel in case the merc handise was damaged from a cause not within the perils excepted in the bill of lading. Here the merchandise was actually shipped by the Steamship Company on the " Queen of the Pacific".

II.

THE THIRD EXCEPTION, TO THE OVERRULING OF WHICH ERROR IS ALLEGED, AND RELIED UPON, IS THAT ALL THE CAUSES OF ACTION IN SAID LIBELS SET FORTH " * * * are in the said several libels shown to have been waived and aban-

doned by the libelants" "prior to the filing of the said libels," "under the provisions of a special contract made "in that behalf by each of said libelants with the said "Pacific Coast Steamship Company, as in said libel "alleged." (R., p. 22.) (Assignment of Error II, R., p. 181.)

The special contract—the 30 day clause—referred to in the foregoing exception is the following:

"It is expressly agreed that all claims against the *P.* "*C. S. S. Co.*, or any of the *stockholders of said Com-* "*pany*, for damage to or loss of any of the within mer- "chandise, must be presented to the Company within "thirty days from date hereof, and that after thirty days "from date hereof, no action, suit or proceeding, in any "court of justice shall be brought *against said P. C. S.* "*S. Co., or any of the stockholders thereof*, for any dam- "age to or loss of said merchandise; and the lapse of "said thirty days shall be deemed a conclusive bar and "release of all right to recover against *said Company, or* "*any of the stockholders thereof*, for any such damage or "loss."

This stipulation is divided into three clauses:

1. That "*All claims against the Pacific Coast Steam-* "*ship Company, or any of the stockholders of said Com-* "*pany*, for damage to or loss of any of the within mer- "chandise, must be presented to the Company within "thirty days from the date hereof;"

2. That "*after thirty days from date hereof*, no "action, suit or proceeding, in any court of justice, shall "be brought *against said Pacific Coast Steamship Com-*

" *pany, or any of the stockholders thereof*, for any dam-
" age to or loss of said merchandise;"

3. That " the lapse of said thirty days shall be deemed
" a *conclusive* bar and release of all right to recover
" *against said Company, or any of the stockholders there-*
" *of*, for any such damage or loss."

The first clause, taken apart from the immediately succeeding clause, is, in case it be not complied with, valueless for any practical purpose, because no penalty is denounced against the shipper or holder of the bill of lading in case he does not present his claim within the thirty days from the date thereof. It contains no provision that, in case his claim is *not* presented within the time limited for that purpose, neither the Company or its stockholders shall be held liable for any such damage or loss. To give, therefore, any practical effect to this clause, it must be construed in connection with the succeeding clause relating to the limit of time in which a suit against the Company or its stockholders can be brought. Taken in this connection, the second clause is unreasonable, in this,

Because the claimant for damages by reason of injury to or loss of the merchandise, has the whole of the thirty days,—to the last hour thereof,—in which to make the claim mentioned in the first clause; a privilege that, by the explicit terms of the contract he has a right to exercise, and this being so, there is no part of the thirty days remaining in which he can commence a suit or proceeding in respect of such damage, as the limit of time in which he may make his claim and the limit of time in

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which to bring his suit expire simultaneously. In other words, the carrier has clearly and unmistakably said to the holder of the bill of lading: "You may have the "whole of the thirty days in which to present your claim "for damage or loss, and after the expiration of this time, "whether you have or have not presented your claim, "you are barred to bring action in respect thereof against "the *Company* or any of its *stockholders*." This limitation gives the holder of the bill of lading a definite time in which to lay his foundation for bringing suit against the carrier company or its stockholders, and then if he avails himself, which as of right he may well do, whether of necessity or for convenience, of the whole of the stipulated time in which to present his claim, and having done this within the time limited, though it may be at the last minute thereof, declares that he is barred from bringing suit because not brought before the expiration of the thirty days' limitation.

If he does not proceed within the limited time, to the whole of which he has an option, then it is a denial of his right of action, and this without any default on his part. Manifestly this is unreasonable.

The limitation of thirty days from the *date* of the bill of lading, within which the merchant was required to ascertain the damage to his merchandise and bring suit therefor, is unreasonable. The question whether this limitation is reasonable or unreasonable is not to be determined by the accidents of a particular occasion, but in view of the probabilities that such delays may arise from injuries to the ship as will not allow the shipper

to ascertain within the period of thirty days the amount of his damage and put him a position to make the claim or bring a suit for the same before the expiration of this time. In this case the damage to the ship might have been of such a character as to have detained her, somewhere in the course of the voyage, for a period of the whole thirty days, if not longer. If the limitation had been confined to a period of thirty days after the damage had been ascertained, or could by reasonable diligence have been ascertained, the question presented would have been entirely different. This was substantially the view taken of it by the Circuit Court of Appeals, to which we respectfully refer. (Opinion, R., p. 208.)

III.

THIS LIMITATION IN THE BILL OF LADING, AS TO THE TIME IN WHICH A SUIT MAY BE BROUGHT, HAS NO APPLICATION TO THE PRESENT ACTION, WHICH IS A PROCEEDING *in rem* AGAINST THE CARRIER *ship* AND NOT AGAINST THE PACIFIC COAST *Steamship Company* OR ANY OF THE *stockholders* THEREOF.

We have seen that the language of this limitation is, (1) "After thirty days from the date hereof no action "* * * * * shall be brought against the *P. C. S.* "*S. Co., or any of the stockholders* thereof, for damage "to or loss of said merchandise;" (2) "and the lapse of "said thirty days shall be deemed a conclusive bar and "release of all right to recover *against said Company,* "*or any of the stockholders thereof*, for any such damage "or loss."

Now, the language of this clause is in *itself* clear, certain and unambiguous. The clause is in the nature of a statute of limitation, inhibiting, after the lapse of a certain time, the initiating of a suit or proceeding against the Pacific Coast *Steamship Company*, or against any of its *stockholders*, to recover damages for injury to or loss of, the merchandise embraced in the bill of lading.

Now, a proceeding *in rem* against a carrier ship of the Company to foreclose or enforce a maritime lien growing out of a breach of a contract of affreightment, is not inhibited in terms, nor can such inhibition be inferred from any reasonable or legitimate interpretation of the words used, or from the construction of the general language of the clause, and it is improbable, in the highest degree, that such a proceeding was contemplated by the Steamship Company when this clause was engrafted into its bill of lading. If it had been, it is reasonable to assume that it would have been inserted in the limitation, especially when the apparent care with which the clause is framed is taken into consideration. If the Company had in mind such an important provision, it would seem incredible that it would have left it to be ascertained by conjecture or the uncertainties of construction.

If, however, the Company intended to include in the limitation a proceeding *in rem* against its steamships, it certainly would not have expressed that intention in language so ambiguous, that to extend the clause so as to embrace such a proceeding would be equivalent to engrafting into it an entirely independent provision. Now, as this clause

is for the benefit of the Steamship Company, and as the language used is its language, if it has chosen to use such as does not clearly express this intention it is to be construed most strongly against it.

" I take the rule to be clearly established, as a general " rule, that words of exception in any instrument, are to " be construed most strongly against the party for whose " benefit they are introduced."

Story, J., in Palmer *v.* Warren Ins. Co., 1 Story, 360, **364**.

" The rule of construction as to exceptions is, that " they are to be taken most strongly against the party " for whose benefit they are introduced. The words in " which they are expressed are considered as his words, " and if he do not use words clearly to express his " meaning, he is the person who ought to be the " sufferer."

Per Lord Lyndhurst, in Blackett *v.* Royal Exch. Assur. Co., 2 Cromp. & J., 244, **251**.

In Fowkes *v.* M. & L. Assur. & Loan Assn., 3 B. & S., 917*, **925***, Cockburn, C. J., referring to the construction of a policy of assurance, said:

" In construing an instrument prepared by the com- " pany and submitted by them to the party effecting the " insurance for his signature, it ought to be read most " strongly *contra proferentes*."

See also,

The Caledonia, 157 U. S., 124, **137**.

Atwood *v.* Reliance Tr. Co., 9 Watts, 88.

N. J. Steam Nav. Co. *v.* Merchants Bank, 6 How., 344, 383.

Airey *et al. v.* Merrill, 2 Curtis, 8, 11.

Hooper *v.* Wells, Fargo & Co., 27 Cal., 28, 29, 39.

Mason *v.* Pritchard, 12 East, 227.

Another reason why exceptions in a bill of lading should be construed most strongly against the carrier is that he and the shipper "do not stand upon a footing of "equality. The individual customer has no real freedom "of choice. He cannot afford to higgle or stand out, "and seek redress in the courts. He prefers rather to "accept any bill of lading, or to sign any paper, that the "carrier presents; and in most cases he has no alterna-"tive but to do this, or to abandon his business."

Liverpool Steam Co. *v.* Phœnix Ins. Co., 129 U. S., 397, 441.

Upon this subject it is needless to multiply authorities. The rule is too well settled.

IV.

The fourth exception to which error is assigned and relied on, is "that said libel and each of said libels "shows that the demand and demands asserted therein "and thereby is and are, and each of them is and all of "them are, stale, neglected, and legally abandoned, and "are barred by virtue of the laws of the State of Cali-"fornia relating thereto, to-wit: Sections 337 and 338 of "the C. C. P., and Sections 2174, 2909, and 2911 of the "Civil Code of said State." (R., p. 22.)

THIS IS A PROCEEDING *in rem*, IN A COURT OF ADMIRALTY TO ENFORCE A MARITIME LIEN ARISING FROM A BREACH OF CONTRACT OF AFFREIGHTMENT, AND SECTIONS 334 AND 338 OF THE CODE OF CIVIL PROCEDURE OF THE STATE OF CALIFORNIA DO NOT APPLY.

NOR IS SUCH A PROCEEDING WITHIN SECTIONS 2174, 2909 AND 2911 OF THE CIVIL CODE OF THE STATE OF CALIFORNIA.

None of these sections have, under the statute or the maritime law of the United States, any application to the case at bar. They are merely municipal regulations that in no wise affect the administration by the Federal Courts of the maritime law of the United States.

"In the exercise of their admiralty and maritime juris-
"diction, the Federal Courts are governed solely by the
"legislation of Congress and the general principles of
"maritime law, and are not bound by State statutes."

Willard *v.* Dorr, 3 Mas., 91.

New Zealand Ins. Co. *v.* Earnmoor S. S. Co., 24 C. C. A., 644.

It has been repeatedly determined by the Federal Courts that a State statute, limiting the time in which actions are to be commenced, does not apply, *ex proprio vigore*, to a proceeding *in rem* to enforce a maritime lien.

In Brown *v.* Jones *et al.*, 2 Gall., 477, 481, it was held that the statute of limitations of Massachusetts applied only to suits at common law for mariners' wages, and not to suits in the admiralty. Judge Story, in the course of his opinion, said:

"It has, in the next place, been argued that it is "apparent from the allegations of the parties, that the "cause of action accrued more than six years before the "commencement of this suit, and that, therefore, it is "barred by the statute of limitations of Massachusetts, "which is substantially a copy of the Stat. 21, Jac. Ch. "16. The language of this statute does not seem appli- "cable to a proceeding in admiralty. A libel *in rem* or "*in personam* is not 'an action of account or upon the "case,' in the legal sense of those terms."

After reviewing the decisions upon this question, he says:

"The natural inference from this brief review of judi- "cial and parliamentary decisions is, that suits in the "admiralty are not within the statute of limitations of "21 Jac. Ch. 16; an inference which, in my judgment, "stands entirely confirmed by every rational construc- "tion of its language."

"* * * * And as the admiralty and maritime "jurisdiction is exclusively confided to the Courts of the "United States, it would be very difficult to maintain "that a statute of limitations of a State could, *proprio* "*vigore*, apply to suits on the admiralty side of these "courts. The provisions in the 24th section of the "judicial act (24th September, 1789, Ch. 20, Sec. 34) "extends only to trials *at common law;* and in no other "cases can State regulations or limitations govern the "courts of the United States, unless they fall within the "principles of universal law which direct and limit the "application of the *lex loci*. However, for the reasons

" already stated, I am entirely satisfied that the statute " of limitations of Massachusetts never was intended to " include suits in the admiralty."

In Willard *v.* Dorr, 3 Mason. 91, the same learned judge says:

" As far as I know, no statute of limitations not abso- " lutely addressed to a Court, has ever been admitted to " control its general jurisdiction over suits."

See, also,

The H. B. Foster, 3 Ware, 167.
The Platina, 3 Ware, 182.
Henry on Adm. Juris. and Prac., 185.

In *The Key City*, 14 Wall., 653, the question whether courts of admiralty are governed by any statute of limitations came directly before the Court. The State statute of limitations having been invoked by the claimant of a vessel as a bar to the proceedings, the Circuit Court sustained this defense, but the Supreme Court held the contrary and reversed the judgment of the Court below with directions to enter a decree for the libelant. In the opinion the Court stated the following propositions:

" 1. That while the courts of admiralty are not gov- " erned in such cases by any statute of limitation, they " adopt the principle that laches or delay in the judicial " enforcement of maritime liens will, under proper cir- " cumstances, constitute a valid defense.

" 2. That no arbitrary or fixed period of time has " been, or will be, established as an inflexible rule, but " that the delay which will defeat such a suit must, in

"every case, depend on the peculiar circumstances of "that case.

"3. That where the lien is to be enforced to the "detriment of a purchaser for value, without notice of "the lien, the defense will be held valid under shorter "time, and a more rigid scrutiny of the circumstances of "the delay, than when the claimant is the owner at the "time the lien accrued."

The Court further said: * * * * "We are of "opinion that if the claimants had shown an ordinary "case of purchase and payment without notice, the lapse "of time would protect them. While on the other hand "we are of opinion that if the claimant had been the "owner when the lien accrued it would not be a good "defense in this instance"

The important question in every case where this defense is raised is, therefore, are there "peculiar equitable circumstances" such as will defeat this suit by reason of the delay? This question can only be answered after an answer has been found to the other and fundamental question: *What are the "peculiar equitable circumstances" operating so as to defeat the suit by reason of the delay in instituting it?* These "peculiar equitable circumstances" are *any change of circumstances occasioned by the delay and materially and adversely affecting the rights of the respondent in the case*, such as loss of witnesses, transfer of ownership of the *res* to a *bona fide* purchaser for value, etc.

At the time of the trial of the case, the claimant neither proved nor attempted to prove any fact tending

to show that its rights had been in the slightest degree affected by the libelants' delay in commencing the proceedings against the vessel. To use the language of the learned Judge of the District Court:

"In the first place, it does not appear that the claim-
"ant, by this delay of four years, has been prejudiced in
"any of his rights, or that any defense which he could
"or would have presented has been impaired or jeop-
"ardized. It does not appear that claimant could or
"would have presented a stronger or better defense,
"had the action been commenced sooner. No pretense
"is made that, by reason of the delay, witnesses have
"died or gone away; or that testimony, once accessible
"and material to a defense of negligence, has been lost.
"In other words, there is no showing by claimant of any
"special or exceptional circumstances which would jus-
"tify this Court, as a court proceeding upon equitable
"principles, to hold that the libelants have been guilty
"of such laches as, in good conscience and equity,
"amounts to an equitable defense and bar to this libel."
(See Opinion, R., p. 155.)

SECTION 337 OF THE CODE OF CIVIL PROCEDURE WOULD NOT, UNDER THE CIRCUMSTANCES OF THIS CASE, BAR A PROCEEDING IN A COURT OF EQUITY.

The libelant's cause of action accrued on the 30th day of April, 1888, either when the ship was submerged at Port Harford or when she sprung a leak on the morning of that day. The libel was filed on the 28th day of April, 1892, less than four years after the cause of action had accrued, and on the same day process thereon was

issued and placed in the hands of the Marshal, and a *bona fide* attempt was made by him to serve it by a seizure of the *res*. The *alias* monition was not issued until after the Marshal had made his return *non est*.

Now, in a Federal Court, a suit in equity is commenced by filing the bill, suing out appropriate process and a *bona fide* attempt made to serve it. When this is done, it stops the running of the statute of limitations.

United States *v.* American Lumber Co., 29 C. C. A., 431, and cases there cited.

We fail to see why this rule should not be applied to proceedings instituted in a court of admiralty, which, within the scope of its powers, acts on equitable principles. Applying this rule to the present case, it is clear that this action was commenced within the time limited by Section 337 of the Code of Civil Procedure.

Whether where the proceeding is *in personam* the statute can be invoked as a defense. *Query.*

Reed *v.* Ins. Co., 95 U. S., 23, 33.

In view of the foregoing decisions the learned judge of the District Court was, we submit, right when he said:

"The question is one addressed to the sound discre-
" tion of the Court, depending upon all the facts of the
" particular case. It is, therefore, a question of evidence,
" to be determined hereafter upon the facts as they may
" appear." (R., pp. 27-28.)

All the exceptions to the libel having been overruled the claimant thereupon filed its answer, in which Sections 337 and 338 of the Code of Civil Procedure of California were pleaded in bar, and in addition thereto, Section

813 of that Code. (R., p. 41.) This section declares liens on vessels for certain causes therein enumerated, some of which would constitute liens under the general maritime law. Thus, subdivision 5 of this section declares a lien "For non-performance, or mal-per- "formance, of any contract for the *transportation* of "persons or *property between places within the State*, "made by their respective owners, masters, agents, or "consignees;" and subdivision 6, "For injuries com- "mitted by them to persons or *property*, in this State." For a breach of a contract of affreightment, and for a collision, liens arise under the maritime law, and the time within which a court of admiralty can exercise its jurisdiction in such cases is not to be limited or controlled by State legislation.

The last clause in this section provides that "such "liens only continue in force for a period of one year "from the time the cause of action accrued."

As the libelants did not proceed to enforce a lien under this statute, but to enforce a lien given by the general maritime law, this limitation therefore is not, in any view, a bar to this proceeding.

IF SECTION 337 OF THE CALIFORNIA CODE OF CIVIL PROCEDURE COULD BE PLEADED IN BAR TO A PROCEEDING IN ADMIRALTY, IT IS NO BAR TO THE PRESENT ACTION.

2. Section 235, of Title II, Chapter III, of California Code of Civil Procedure, provides that "the periods "prescribed for the *commencement* of actions * * * are as follows:

"Section 337. Within four years: An action upon

"any contract * * * founded upon an instrument in "writing executed in this State".

Now, Chapter IV. of Title II, Section 350, declares that "an action is *commenced* within the meaning of this "title, when the complaint is filed."

The *filing* of the *complaint* is all that is necessary to stop the running of the statute.

Sharp *v.* Maguire, 19 Cal., 577.

When, therefore, Section 337 of the Code is invoked as a bar to the suit, it must be taken subject to the provisions of Section 350. If this view be correct, then the case is clearly not barred by Section 337, as the libels were, as we have seen, filed on the 28th day of April, 1892.

It is, therefore, submitted that there is no error in the overruling of the third and fourth exceptions, or in finding that the libelants were not, under the circumstances, guilty of such laches as to bar a recovery.

V.

THE NEXT EXCEPTION TO THE LIBEL, WHICH, FOR CONVENIENCE, WE WILL NUMBER (5,) IS, IN SUBSTANCE, THIS:

"And further excepting to said libel and said libels, "the claimant alleges that this Court has not jurisdiction "in the matter alleged, because the steamship 'Queen "of the Pacific,' was not, when said libels were filed in "this Court, within the Northern District of California." (R., p. 22; Assignment of Error IV, R., p. 182.)

THE PRESENCE IN THE DISTRICT, OF THE *res* PROCEEDED AGAINST WHEN THE LIBEL IS FILED, IS NOT NECESSARY TO GIVE THE COURT JURISDICTION OVER THE SUBJECT-MATTER OF THE LIBEL; IT IN NO WAY AFFECTS THE MARITIME NATURE OF THE CLAIM NECESSARY TO GIVE THE COURT JURISDICTION OVER *it*.

In a proceeding *in rem* in a court of admiralty, the jurisdiction or power of the court to adjudicate the case upon the merits, and dispose of it as justice may require, depends, (1) upon the maritime nature of the subject-matter of the proceeding; and, (2) that the *res* proceeded against is within the lawful custody of the court. *Immediate* jurisdiction over a contract, maritime in its nature, is *acquired* by the filing of the libel, and is *exercised* by issuing process thereon. Jurisdiction over the *res* is acquired by a legal seizure thereof on process issued for that purpose.

The Resolute, 168 U. S., 437.

The filing of the libel is necessary to give the Court jurisdiction over the subject-matter of the action, and to enable it to issue its process. It gives it no jurisdiction over the *res*. This is acquired only by virtue of a seizure thereof by the Marshal under the process of the Court issued to him for that purpose.

Miller *v.* United States, 11 Wall., 268, 294.

That this seizure must, however, be made within the territorial limits of the judicial district within but not beyond which the process of the District Court for such

district extends, is now too well settled to admit of controversy.

It appears from the record that the libel of the Bancroft-Whitney Company and that of Hellman, Haas & Company were severally verified and filed in Court on the 28th day of April, 1892. Both these libels contain the allegation required by Admiralty Rule 23, that "If "the proceeding be *in rem* that the property is within "the district." In Article IV of these libels it is alleged, "That said steamship is now within the North-"ern District of California." (R., pp. 6, 7, 12, 13.) There is nothing in the record to show, or to raise a presumption even, that this allegation was not true.

Had this averment been, inadvertently, omitted and process issued on the libel, whatever other consequences might have resulted from such an omission, we apprehend the libel would not have been dismissed for want of jurisdiction over the subject-matter of it, because this rule is one of practice and procedure, and not one affecting the jurisdiction of the Court over a maritime contract. "There is a wide difference between the power of the Court upon a question of jurisdiction, and its authority over its mode of proceeding and process."

The St. Lawrence, 1 Black, 522, 526.

Now, the cause of action was for a breach on the part of the carrier of his contract of affreightment, over which the Court, as a Court of Admiralty, had and could exercise jurisdiction, and it acquired this jurisdiction over this cause of action by the filing of the libel and exercised it by issuing its process, which it could not do until the libel

was filed, whether the relief sought were *in personam* or *in rem*. The issuance of process is a mere exercise of jurisdiction acquired by the commencement of the proceedings.

"By jurisdiction over the subject-matter is meant the "nature of the cause of action and of the relief sought, "and this is conferred by the sovereign authority which "organizes the Court, and it is to be sought for in the "general language of its powers or in authority specially "conferred."

This jurisdiction over the cause of action is entirely different from its jurisdiction over the person or over the *res*, which is acquired, in the first case, only by service of process on the *person*, and, in the second, by a seizure of the *res*. After the libel has been filed and process issued thereon, the Court can go no further until, in the one case, the person has been served or voluntarily appears, and in the other, until there is an actual seizure of the *res*, except, perhaps, as provided in Section 941, of the Revised Statutes of the United States.

"Jurisdiction of the *res* is obtained by a seizure under "process of the Court, whereby it is held to abide such "order as the Court may make concerning it."

Cooper *v.* Reynolds, 10 Wall., 308, **316, 317.**
Miller *v.* United States, 11 Wall, 268, 294.

The Court having jurisdiction over the cause of action, that is, the power lawfully conferred to deal with the general subject involved in the action, its power to issue process on a libel stating the jurisdictional facts necessary thereto, does not admit of a doubt.

If, therefore, we assume that the ship had departed from the territorial jurisdiction of the Northern District of California before the libel was filed, such departure did not oust the jurisdiction of the Court over the subject-matter of the suit, and it might be seized, as it was, on an *alias* monition on its return to the District, whether such seizure was made on the 4th day of May, or at any later day prior to the return day of the process.

Now, can it be successfully contended that such an arrest was unwarranted by reason of the vessel being out of the District when the proceedings necessary to make a seizure within the District were initiated. Suppose that after the libel was filed, it had been discovered that at that time the vessel had departed from the District, and therefore no process of arrest was issued, but on her coming afterwards within the District, it was issued, and an arrest made under it; could it be successfully maintained that such an arrest was a nullity? We respectfully submit that it could not.

In the case of the "L. B. X.", referred to in the Court below by counsel for claimant, and to which the attention of this Court may, perhaps, be called, the point here under discussion was not raised. In that case the seizure was made out of the territorial jurisdiction of the Court issuing the process, and it was held that the attachment was void, and the libel was dismissed, and, for aught that appears, on that ground only.

There is a strong analogy between a case where the *res* is without the territorial jurisdiction of the Court when the libel is filed, and one where it is in the hands

of a receiver appointed by a State Court, of co-ordinate jurisdiction, or in the hands of one appointed by a Circuit Court of the United States.

Where, in such cases, process *in rem* had been issued by a Federal Court, but the *res* was, at that time, in the hands of a State Court, of *co-ordinate* jurisdiction, on process issued by it, the Federal Court *refused to dismiss* the libel, but postponed its action thereon until the proceedings in the State Court were terminated.

The James Roy, 59 Fed. R., 784
The Sailor Prince, 1 Ben., 234.
The Oliver Jordan, 2 Curt., 414.
The E. L. Cain, 45 Fed. R., 367, 370.
Moran *v.* Sturges, 154 U. S., 256, and cases there cited.

In such cases, the *res* is as much out of the power of the Federal Court to reach it by its process, as though it were without the district. While, therefore, it had jurisdiction over the subject-matter of the suit, it had none and could get none over the *res* so long as that remained in the custody of the State Court, and when the hand of the latter was stayed, the Federal Court then proceeded to execute its process, because the *res* had then come within and was subject to, its jurisdiction.

So far we have dealt with the matter on the assumption that the vessel was not within the Northern District of California when the libel was filed. But what is the fact? These libels were verified, as we have seen, on the 28th day of April, 1892. That the vessel was within the Northern District of California, up to eleven o'clock

on that day, is not disputed. On page 69 of the Record, counsel for claimant said, "I think she sailed at eleven o'clock." So that the libels might not only have been verified but have been filed before that hour, and yet when the Marshal sought for the vessel she might have departed from the port, if not from the District. There is not a scintilla of evidence in the record to show to the contrary. The presumption is that at the time the libel was verified before a notary, the allegation that she was within the District was true, and the learned District Judge found that "there is testimony tending to establish the fact "that the steamship was within the jurisdiction of the "Court when the libel was filed." (Rec., Opinions 76, 171.)

The claimant, as a defensive allegation, avers in its answer "that when said libel was filed, said steamship "was and for four days and upwards continuously there-"after, she (said steamship) remained without the said "Northern District of California" (R., p. 33, Art. IV); and claimed in the Courts below that, inasmuch as the fact that she was within the District when the libel was filed, was denied, the burden of proving that she was then within the District was on the libelant. We submit that this contention, if now insisted on, is, in point of law, not well founded.

The allegation in the answer, is, in substance and effect, a plea in abatement to the jurisdiction, for matter not apparent on the record, and the burden of verifying such a plea is on the party pleading it.

Shepard *v.* Graves, 14 How., 505.

Gilmer *v.* City of Grand Rapids, 16 Fed. R., 707.
Foster *et al. v.* C. & St. L. Ry. Co., 56 Fed. R., 434.

It is, therefore, respectfully submitted that in the overruling of the (5th) and "further" exception to the libel, there is no error.

VI.

The sixth assignment of error, relied upon below, is to the overruling of the claimant's objection to the admission of the testimony of Abraham Haas and E. W. Newhall, witnesses called on behalf of the libelants. (*Rec., pp.* 182, 186, *Assignments* 6 *and* 7.

Abraham Haas, called as a witness on behalf of the libelants, Hellman, Haas & Co., after testifying that on the 27th day of April, 1888, he was a member of the firm of Hellman, Haas & Co.; that this firm had merchandise on board of the steamer "Queen," consigned to his firm at Los Angeles, at the time she departed from San Francisco on the voyage in question; that a paper shown him, and marked "Merchandise on Steamer 'Queen'," was either the bill or a copy of the bill which was handed to Gutte & Frank for the goods shipped on the "Queen," the following questions were propounded to him by counsel for libelants:

Mr. Andros—Q. Do you know what goods were shipped on board of her? A. I know by the bills.

Q. Please to state. Refresh your memory from that paper and state what they were.

Mr. Towle.—I object to any testimony from that paper.

Mr. Andros.—Q. In whose handwriting is that?

A. This is in the handwriting of a clerk of ours who was with us then, and who is now with us in Los Angeles.

The Court.—Q. Do you know anything about that paper yourself?

A. Nothing more than I told the young man to make it out at the time. He made it out under my supervision. * * *

Mr. Andros.—Q. I will ask you to see, as I read this, whether it corresponds with what is on the back of this bill of lading: "50 cases of canned vegetables."

Mr. Towle.—We object to that as irrelevant, immaterial and incompetent, whether it agrees with the memorandum or not.

Mr. Andros.—I propose to prove the cost price of these goods by Mr. Haas, and I want to simply identify these goods by that memorandum so that he may testify as to the cost. * * *

Mr. Towle.—So far as it has a bearing upon the question of price, if the witness proposes to testify from that memoranda as to prices, we shall object to that. We object to these questions. If the witness is to testify, he can as well testify from the items on the bill of lading as from a memorandum which agrees with those items.

The Court.—His memorandum probably has the prices attached.

Mr. Andros.—Yes, sir.

Q. Fifty cases of canned vegetables. What was the price of this, Mr. Haas?

Mr. Towle.—Q. Are you testifying from your memorandum or from your own knowledge?

A. I am testifying from the memorandum.

Mr. Andros.—Q. Did you at the time know the cost of these goods? A. Yes, sir.

Q. Did you buy them? A. Yes, sir.

Q. Bought them yourself here?

A. Either bought them myself, or they were bought under my supervision.

Q. So at that time you did know what they cost?

A. Yes, sir.

Q. Did you subsequently instruct that memorandum of that cost to be made? A. Yes, sir.

Q. At the time that you made that memorandum yourself, or had it made under your supervision, were the figures therein mentioned the true cost of those goods?

A. Yes, sir.

Mr. Towle.—We ask that that answer be stricken out. We object to that as irrelevant, immaterial and incompetent testimony; that the witness cannot prove these values by some figures appearing on a paper. * * * We submit that the only memorandum that can be used is one made by himself at the time. * * *

The Court.—Or under his direction.

The Witness.—It was our bookkeeper.

Mr. Towle.—But he directs somebody to make up a memorandum, and that party presents that to him; that does not authorize him to testify from it. * *

The Court.—He goes further than that—he says he knew it to be correct.

Mr. Andros.—Q. With reference to the time these goods were shipped, when was that memorandum made?

A. I suppose immediately after the ship went down.

The Court.—Q. I understand you to say that you knew that the charges there were correct at the time?

A. Yes, sir.

Q. At that time?

A. They were made from the invoices; copy of the invoices.

Mr. Towle.—Q. Mr. Haas, did you compare that memorandum with the invoices after it was handed to you?

A. That I am not sure of, but I imagine that I did. *

Q. Hellman, Haas & Co. still exists?

A. Their successors exist.

Q. Their books of account at that time still exist?

A. I think they do.

Q. You know from whom these goods were bought?

A. Yes, sir; they can be dug up if the books and papers are not destroyed. * * *

Mr. Towle.—We submit that this memorandum is not the best evidence.

The Court.—I think it comes within the rule that where a person knows the correctness of a book, he may refresh his recollection, although the entry may not have been made by him. Motion to strike out denied.

Mr. Towle.—Save an exception.

Mr. Andros.—What was the cost price of the 50 sacks of canned vegetables?

Mr. Towle.—We object to that question because the

answer will be based upon that memorandum which the witness holds in his hand.

The Court.—Objection overruled.

Mr. Towle.—Exception.

A. 100 dozen asparagus * * * $175.

Q. 250 kegs of nails * * *

Mr. Towle.—We object to that question so far as it is based on that memorandum. It is understood that all these questions are objected to, and exceptions saved.

The witness thereupon, in response to questions by Mr. Andros, proceeded to testify, from said memorandum, that the cost of 250 kegs of nails was $775; 400 sacks of rice, $2,100; 20 packages of tea, $86.40; 3 bbls. of currants, $66.55; 420 mats of rice, $861; 250 barrels of sugar, $4,921.09; 100 half barrels of sugar, $944.39; 10 cases salad oil, $90; 35 cases of pickles, $132.50; and 13 cases of drugs, $63.20. (R., p. 59.)

To all the aforesaid rulings of the court and the admission of the testimony of said witness as to the cost of the items of merchandise inquired of, the claimant assigns error. (R., p. 182, assign. VI.)

The libelant then called as a witness on behalf of Hellman, Haas & Co., E. W. Newhall. This witness testified that in April, 1888, he was a member of the firm of Newhall Sons & Co., auctioneers; that he remembered that goods were landed in a damaged condition at the sea wall from the steamer "Queen of the Pacific"; that he sold such goods at public auction, and that some of them were those of Hellman, Haas & Co.; that his firm

catalogued and advertised the goods, and he produced the catalogue used at the sale. (R., p. 62.)

Mr. Andros.—Q. Are you able to state what goods you sold for Hellman, Haas & Co.?

A. Identify them by catalogue? Q. Yes, sir.

Mr. Towle.—We object to that as irrelevant, immaterial and incompetent. Whatever goods he may have sold for Hellman, Haas & Company is immaterial from any view of this case. * * *

I say the price realized is immaterial. It does not tend to show the actual value of the goods; * * * they must prove the damage by some source which goes to the condition, and then experts can testify from that condition as to the extent of the damage. (R., p. 63.)

The Court.—Overrule the objection.

Mr. Towle.—Save an exception.

Mr. Andros.—Q. What were the articles that you sold in a damaged condition from the steamer "Queen, of the Pacific" that belonged to or were marked "Hellman, Haas & Company"?

A. They were marked "H. H. & Co." Are those the ones you want?

Q. Yes; what were they?

A. They were 420 mats of rice, 400 sacks of rice, 250 kegs of nails.

Mr. Towle.—This is all understood to be subject to the objection?

The Court.—Yes, sir.

The Witness.—20 packages of tea, 13 boxes of drugs, 10 cases of chow chow, 25 cases of pickles, 50 cases of

asparagus, 10 cases of Lucca oil, 250 barrels sugar, 100 half barrels sugar, 3 barrels currants. That is all.

Mr. Andros.—Did you, at the time of this sale, or about that time, notice the condition which the packages were in, with reference to being wet?

A. I don't remember; it is so long ago. The goods were damaged; that I remember very distinctly.

Q. What did these articles bring; what was the gross sale?

Mr. Towle.—We object to that as irrelevant, immaterial and incompetent, and not tending to prove the damage to the goods.

The Court.—Overrule the objection.

Mr. Towle.—Exception.

A. The gross sales were $1,262.20.

Mr. Andros.—Q. What was the net?

A. $1,190.09.

To all the aforesaid rulings of the Court in respect to the admissibility of the foregoing testimony the claimant excepted and assigns error. (R., p. 186.)

A WITNESS MAY USE A MEMORANDUM TO REFRESH HIS RECOLLECTION ALTHOUGH IT IS NOT MADE BY HIMSELF, IF HE SAW THE PAPER WHILE THE FACTS THEREIN STATED WERE FRESH IN HIS RECOLLECTION, AND HE CAN SAY HE THEN KNEW THEY WERE CORRECTLY STATED.

In Coffin *v.* Johnson, 12 Cush., 98, a copy of a notice containing a statement of the time, place, and cause of impounding certain cattle was shown, and at the trial one Fields testified that he was one of the field drivers. That they used a particular form of notice, and a form or

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copy of such notice was produced to the witness. The Court allowed the witness to examine it for the purpose of refreshing his memory over the objection of the plaintiff's counsel, and the Court said:

"It is insisted that the permission given to the wit-
"ness, Thomas B. Fields, to inspect the form produced
"by him for the purpose of refreshing his memory, was
"irregular and erroneous. And it is contended that the
"true rule of law on this subject restricts a witness to
"the examination of such papers merely as are written
"by himself, or by some other person with his knowl-
"edge, at or near the time when the facts recited in it
"occurred. But this narrow limitation is neither war-
"ranted by the authorities referred to, nor consistent
"with the reason upon which the practice is allowed. In
"1 Greenleaf on Evidence, Sec. 436, it is said that it
"seems not to be necessary that the paper should have
"been made by the witness himself, nor that it should
"be an original writing, but it is sufficient if the witness
"recollects that he saw the paper while the facts were
"fresh in his recollection, and remembers that he then
"knew that the particulars therein mentioned were cor-
"rectly stated. And in *Henry* v. *Lee*, 2 Chit., 124, it
"was determined that 'if a witness, in looking upon any
"'document, can so far refresh his memory as to recol-
"'lect a circumstance, he may inspect it; and it makes
"'no difference that it was not written by himself; for it
"'is his recollection and not the memorandum that is
"'the evidence.' * * * He was, therefore, very

" properly permitted by the presiding judge to use it for " that purpose."

In Horne *et al. v.* McKenzie *et al.*, 6 Clark & Finn., 627, 629, **644**, a surveyor made a survey or report which he furnished to his employers, being afterwards called as a witness, he produced a printed copy of his report, on the margin of which he had two days before, to assist him in giving his explanation as a witness, made a few jottings. The report had been made up from his original notes, of which it was in substance, though not in words, a transcript. This was objected to by defendant's counsel, and the objection was overruled, and the witness was permitted to examine the paper for the purpose of refreshing his recollection. In the House of Lords, the Lord Chancellor said:

" But I may say that in my opinion the witness was, " under the circumstances of this case, entitled to refer " to the paper to refresh his memory."

So, in Commonwealth *v.* Ford, 130 Mass., 64, it was held that a witness may be allowed, for the purpose of refreshing his recollection to what is stated at a particular time, to look at a printed copy of his own written report of the proceedings at that time, although the absence of the written report was not accounted for.

In Huff *v.* Bennett, 6 N. Y., 337, **339** (2 Selden), the Court said:

" Although the rule is that a witness, in general, can " testify only to such facts as are within his own knowl- " edge and recollection, it is well settled that he is per- " mitted to assist his memory by the use of any written

" instrument, memorandum, or entry in a book, and it is " not necessary that such writing should have been made " by the witness himself, or that it should be an original " writing, providing that, after inspecting it, he can speak " to the facts from his own recollection."

In Cameron *v.* Blackman, 39 Mich., 108, it was held that where a witness swears he has a recollection of the facts, it makes no difference that the memorandum he uses to refresh his memory was not from his own entries.

" A witness, to refresh his memory, may use a memo- " randum not made by himself, where, after using it, he " can recollect the facts stated in it and testify to them " as matters of present recollection."

Hill *v.* State, 17 Wis., 697.

In Dugan *v.* Mahoney, 11 Allen, 572, it was held that if a witness on looking at a memorandum made by him at the time, is able from it to testify to the delivery of goods, the testimony is admissible, though he has no present memory of the transaction and the memorandum itself has been held incompetent. Hoar, J., said:

" The rule is thus stated by Mr. Greenleaf, in his " treatise on Evidence, when giving the different classes " of cases in which writings may be shown to witnesses " to aid their recollection; ' Where the witness recollects " ' having seen the writing before, and, though he has " ' no independent recollection of the facts mentioned in " ' it, yet he remembers that at the time he saw it he " ' knew the contents to be correct. In this case the " ' writing itself must be produced in court, in order that " ' the other party may have the benefit of the witness'

" ' refreshing his memory by every part.' 1 Greenl. Ev.,
" Sec. 437. And see cases there cited. It is obvious
" that this species of evidence must be admissible in
" regard to numbers, dates, sales and deliveries of goods,
" payments and receipts of money, accounts, and the
" like, in respect to which no memory could be expected
" to be sufficiently retentive, without depending upon
" memoranda; and even memoranda would not bring
" the transaction to present recollection. In such cases,
" if the witness, on looking at the writing, is able to
" testify that he knows the transaction took place,
" though he has no present memory of it, his testimony
" is admissible."

See, also, 3 Jones on Evidence, Sec. 880, *et seq.*

Now, as the witness testifies that he knew the cost of the goods; that he bought them himself, or that they were bought under his supervision; that the memorandum from which he was requested to refresh his memory was made out under his supervision; that this memorandum was made immediately after he had heard that the ship had gone down; that he knew at that time the cost of the articles therein specified was correct; that the memorandum was made from the invoices or copies of the invoices; that when the memorandum was handed to him, though not sure that he compared it with the invoices, "but I imagine I did," we submit that a sufficient foundation was laid for the witness to be permitted to avail himself of this memorandum for the purpose of refreshing his memory, and that permitting him to do so was not error.

The testimony of both Haas and Newhall was material as tending to show the value of the merchandise in its damaged condition, and it would seem that no better way to ascertain this value could have been employed than by a public sale of it, after reasonable public notice that such sale would be made. This was done. (Newhall, R., p. 62.)

Had the merchandise been appraised as was suggested by counsel for claimant, still it would have been necessary that it should be sold, and the appraised value would not have determined the price which it would have brought at that sale. From the nature of the articles sold, it is evident that their submersion for several days in sea water, must, of necessity, have greatly damaged them.

It does not appear but that the sale was fairly conducted or that the prices realized were not all that the merchandise was worth; or that any greater price could have been realized at private sale had such an unusual method for the sale of a large quantity of damaged goods been resorted to.

VII.

The third subdivision of the VIIIth assignment of errors relied upon, is as follows:

Third.—That there is no proof that claimant, the Pacific Coast Steamship Company, or that the officers or crew of the steamer "Queen," the servants of the steamship company, *or that the officers or crew of the steamer "Queen," the servants of the steamship company*, have

been, or were, guilty of any negligence in the premises. (R., p. 187.)

The claimant in its answer admits that the merchandise of Bancroft-Whitney Company "was not delivered at San Diego; admits that the same was returned to San " Francisco; *admits that the same was damaged by rea-* " *son of having been wet with sea water*, but denies that " the same was so wet with sea water *during said voy-* " *age*, or by reason of the negligence of the steamship " company, its officers, and servants." (Ans., Art. III; R., p. 33; Art. II, p. 38.)

The same admission and denial are also made in the answer to the libel of Hellman, Haas & Company. (Art. III, R., p. 43; Art. III, R., p. 49.)

WHERE GOODS ARE SHIPPED AND THE USUAL BILL OF LADING GIVEN, PROMISING TO DELIVER THEM IN GOOD ORDER, THE DANGERS OF THE SEA EXCEPTED, AND THEY ARE FOUND TO BE DAMAGED, THE *onus probandi* IS UPON THE OWNERS OF THE VESSEL TO SHOW THAT THE INJURY WAS OCCASIONED BY ONE OF THE EXCEPTED CAUSES.

" At common law, a carrier by land is in the nature of " an insurer, and is bound to keep and carry the goods " entrusted to his care safely, and is liable for all loss, " and in all events, unless he can prove that the loss " happened from the act of God, or the public enemy, or " the act of the owner of the goods. Common carriers " by water, like common carriers by land, in the absence " of any legislative provisions prescribing a different rule, " are also, in general, insurers, and *liable at all events*, " for *every* loss or damage, *however occasioned*, *unless* it

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"happen by the act of God, or the public enemy, or by "some other cause or accident without any fault or "negligence on the part of the carrier and expressly ex- "cepted in the bill of lading."

"Carriers by water * * * are in the nature of "insurers, and are liable, as before remarked, in all "events, and from any loss, however sustained, unless it "happens from the act of God, or the public enemy, "or by the act of the shipper, or from some other cause "or accident expressly excepted in the bill of lading."

The Propeller Niagara *v.* Cordes *et al.*, 21 How., 13, **22, 23, 26.**

"After the damage to the goods has been established, "the burden lies upon the carrier to show that it was "occasioned by one of the perils from which he was "exempted by the bill of lading.

"Where evidence has been given proving the particu- "lar loss or damage within one of the dangers or acci- "dents excepted in the bill of lading, it is still competent "for the shippers to show that it might have been avoided "by the exercise of reasonable skill and attention on the "part of the persons employed in the conveyance of the "goods, but in this state of the case the burden is upon "the plaintiff to establish such negligence, as the affirm- "ative of this lies upon him."

Clark *v.* Barnwall, 12 How., 272, 280.
Rich *v.* Lambert, 12 How., 347, **356, 357.**
The Mascotte, 2 C. C. A., **399.**

"Such burden is not sustained by showing that the

" damage was occasioned by a leak, and suggesting that " it arose from some inexplicable action of the elements, " without negativing other causes of the leak, which " would leave the carrier liable."

The Emma Johnson, 1 Spr., 527.

" That the signing of the bill of lading acknowledging " to have received the goods in question, in good order " and well conditioned, is *prima facie* evidence, that, as " to all circumstances which were open to inspection and " visible, the goods were in good order; but it does not " preclude the carrier from showing, in case of loss or " damage, that the loss proceeded from some cause, " which existed but was not apparent, when he received " the goods, and which, if shown satisfactorily, will dis- " charge the carrier from liability. But in case of such " loss or damage, the presumption of law is, that it was " occasioned by the act or default of the carrier, and of " course the burden of proof is upon him to show that " it arose from a cause existing before his receipt of the " goods for carriage, and for which he is not responsible."

Hastings *v.* Pepper, 11 Pick., 43.
Hunt *v.* Propeller Cleveland, 6 McLean, 76.

" The shipper makes out his case by proving his con- " tract and the non-delivery of the goods."

Wheeler on Carriers, 252.

The same rule is applied to cases of damage.
Rich *v.* Lamber, 12 How., 347, 357.

See, also, Lewis *v.* Smith, 107 Mass., 334, 338.
The Compta, 4 Sawy., 375, 377.
The Lydian Monarch, 23 Fed., 298, **299.**
Christie *v.* Griggs, 2 Camp., 79, **80, 81.**

"When goods are damaged while in the possession of "the carrier, the presumption is that such damage arose "from his negligence, and the burden is on him to show "that it arose from a cause for which he was not re- "sponsible under the bill of lading."

In this case it was held that when goods in the custody of a common carrier are lost or damaged, the presumption of law is that it was occasioned by his *default*, and the burden of proof is upon him to prove that it arose from a cause for which he is not responsible.

Nelson *et al. v.* Woodruff *et al.*, 1 Black, 157, **169.**
Hurt *v.* Propeller Cleveland, 6 McLean, 76.
Lawson on Carriers, § 245.
Angell on Carriers, § 202.
The Mohler, 21 Wall., 530, **533.**

It is not necessary for the plaintiff to *prove negligence* on the part of the carrier, although it be *averred.*

Chitty on Carriers, 142*.
Richardson *v.* London & S. C. Ry. Co., 7 Com. B., 832.
Dale *v.* Hall, Wils., 281.
Christie *v.* Griggs, 2 Campb., 79, **80, 81.**

In the case at bar, the carrier has neither brought the cause of damage within any of the excepted perils, but has not even attempted to do so by his pleadngs or proofs. It has not set up in its answer, as a de-

fense, any of the exceptions in the bill of lading, nor did it attempt to introduce evidence in respect to the cause of the leak. These are very significant facts, especially as it may, under the evidence, be fairly assumed that it must have known where the leak was, and the location of the injury which caused it, otherwise it could not have stopped it. Instead of setting up any of the excepted perils as a defense, it studiously avoided doing so.

"The conduct of a party in omitting to produce that "evidence in the elucidation of the subject-matter in dis- "pute which is within his power and which rests pecu- "liarly within his own knowledge, frequently affords "occasion for presumptions against him, since it raises a "strong suspicion that such evidence, if produced, would "operate to his prejudice."

1 Starkie on Evidence, 54.

Gulf & S. F. Ry. Co. *v.* Ellis, 4 C. C. A., 454, 456, and the cases there cited.

CAPTAIN ALEXANDER, having been recalled, testified as follows:

"*Mr. Andros.*—Q. If you did discover—I am not "asking you whether you did or not—the place where "this leak was, was it below the water line when the "ship was on an even keel?

"A. No, sir." (R., p. 106.)

* * * * * .

"*Mr. Andros.*—Q. When you raised the steamer at "Port Harford in order to do that, did you pump her "out? A. Yes, sir.

"Q. Was it necessary in order to pump her out to

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" float her to ascertain where the leak was? I do not " ask you what it was.

" A. I understand. Not necessarily so.

" Q. Did you understand where it was?

" *Mr Towle.—Personally*, yourself? No.

" *Mr. Andros.*—Q. Did you know, as master of that " ship, where it was?

" A. No, sir; I did not *know* where it was.

" Q. Did you send down a diver? A. Yes, sir.

" Q. How many times did the diver go down?

" A. I think some three or four times—five may be " —I don't remember exactly. That I could not say.

" Q. When he went down the first time, for what " purpose did he go?

" A. He went to see if he could find anything wrong " with the ship or a hole in her. The condition of her " bottom as far as he could see.

" Q. Did he go down at any time for the purpose of " stopping any leak that he might have found?

" A. I think he did; yes.

" Q. So far as you know, did he stop it?

" A. So far as I know, he did.

" Q. After he had gone down for the purpose of " stopping the leak, and returned, did you then com- " mence pumping her out for the purpose of floating " her?

" A. After all the bulkhead doors were secured from " the inside, we built a coffer dam around the forward " hatch, and we pumped her out.

" Q. You had to build a coffer dam around her in " order to free her from water? A. Yes, sir.

"Q. When she was pumped out, she would float, of "course? A. Yes, sir.

"Q. How long after she floated was it before she "started to come to San Francisco?

"A. I think we were here in about forty-eight hours "after she was floated.

"Q. Did she leak coming up to your knowledge?

"A. She made no water to my knowledge.

"Q. Was Captain Charles Goodall there during the "time she was being freed from water? A. Yes, sir.

"Q. How long after she sunk was it before Captain "Charles Goodall came down to the scene of the dis-"aster, if you recollect, or about how long?

"A. I think he arrived in about 24 hours. I could "not say positively. My impression is that he arrived "the next day. That is my impression. I think it was "the next day he arrived. He came down on the 'Santa "Rosa,' I know.

"Q. Was he there at the time when the diver went "down for the purpose of examining the bottom of said "ship? A. I think he was; yes, sir.

"Q. You testified the other day that an attempt was "made to discover where the leak was by looking along "the outside of the ship? A. Yes, sir.

"Q. Was that done by sending a man in a bowline "—I think you so testified? A. Yes, sir.

"Q. Did he go below the stringer of which you have "spoken? A. No, sir.

"Q. Whereabouts is that stringer located with ref-"erence to the dead lights of the ship—above them?

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"A. Just above the dead lights. The dead light is "close up on to the guard. It may be 6 or 8 inches— "something like that, but not far from that." (R., pp. 141, 142, 143.

CAPTAIN CHARLES GOODALL testified as follows:

"*Mr. Towle.*—Captain, you were connected with the "Pacific Coast Steamship Company in 1888? A. Yes.

"Q. In what capacity?

"A. President of the Company.

"Q. What, if any, had you to do with the vessels "belonging to the Company?

"A. General management.

"Q. With the Steamship Company? A. Yes, sir." (R., pp. 121, 122.)

While Captain Alexander was being examined as a witness, the Court put to him several questions, among which was the following:

"I will ask you another question, to which there may "be an objection made by counsel, and you need not "answer it until I determine the objection. After the "'Queen of the Pacific' was raised at Port Harford, *did "you discover the cause of the leak?*

"*Mr. Towle.*—We object to that.

"*The Court.*—What is the ground of your objection?

"*Mr. Towle.*—The objection is that it is not a part of "our case, and is not the theory on which we are trying "it, as to what may have been discovered after the ves- "sel had been on the rocks.

"*The Court.*—I appreciate the fact that you are trying "the case very thoroughly and on a very narrow margin.

" I think. for the time being, I will sustain Mr. Towle's " objection to the question put by the Court.

" *Mr. Towle.*—I would like your honor to withdraw " the question.

" *Mr. Andros.*—I would prefer that the objection be " sustained.

" *The Court.*—I do not want anything that the Court " does to change the theory of the case. I will with- " draw the question for the present and will see what " may come hereafter. I do not know what I may do " hereafter. (R., p. 104.)

Subsequently, Mr. Towle, counsel for the claimant, moved the Court that all the foregoing testimony relating to the question put by the Court be stricken from the record, which, after argument, and on objection of libelants' counsel, the Court declined to do. (R., pp. 129, 130, 131.)

VIII.

The 16th assignment of error is as follows:

" 16. *The Court erred in its conclusion that the cause " of action in the libels herein alleged is for a breach of " contract.*"

The 17th assignment is substantially the same but in another form. (R., p. 190.)

THE LIBELS ARE FRAMED IN ASSUMPSIT AND NOT IN TORT.

It is to be observed that, to use the language of Judge Story in The Adeline, 9 Cranch, 284, " No proceedings " can be more unlike than those in the courts of com- " mon law and admiralty." In proceedings at common

law the pleadings are to be construed closely and technically, oftentimes to the exclusion of substance, but "all "our courts of admiralty agree in regarding substance as "of more importance than form, in the proceedings "which come before it, and, therefore, any process in "admiralty is, in general if not always, sufficient, which "distinctly brings the substance of a case and the actual "parties before a proper court, in such way as to permit "the questions of the case to be investigated, its merits "ascertained, and justice done."

2 Pars. Ad., 369.

Now, as we understand the contention of claimant's counsel, it is that the allegation in the libel that the sea water, which damaged the libelant's merchandise, gained access to the ship through the *negligence* of the *owner of the ship*, as well as that of its officers and servants, constitutes a proceeding in tort and not in assumpsit.

The cause of this action is a contract of affreightment, which, in a formal manner, is declared on in the libel. After stating "the nature of the cause," as required by Admiralty Rule 23 to be "*a cause of contract civil and maritime*," it is alleged that on or about the 28th day of April, 1888, at the port of San Francisco * * * "the "libelant shipped in good order and condition, one case "of books on the steamship 'Queen of the Pacific,' * * "to be in and by said steamship transported to the port "* * of San Diego * * there to be delivered in "like good order and condition as when received, unto "Bancroft-Whitney Company; and the said *Pacific Coast* "*Steamship Company, when it received said goods on*

" *board of said steamship for transportation as afore-*
" *said entered into a contract of affreightment in writing*
" with this libelant, wherein it acknowledged to have
" received said goods in apparent good order, *and then*
" *and there promised and agreed to transport said goods*
" *to said port or place of San Diego, and there deliver*
" *them unto Bancroft-Whitney Company in like good*
" *order as when received*, certain perils in said agreement
" mentioned excepted. A copy of said contract in said
" writing herein referred to is hereto annexed and made
" a part hereof, from which it appears that the freight,
" $1.15, was prepaid. (R., pp. 5, 6, 10.)

The material parts of this contract are, for the purposes of this discussion, as follows:

" Received of Bancroft-Whitney Co., to be shipped
" on board the P. C. S. S. Co. steamer 'Queen of the
" Pacific' * * * the following property in apparent
" good order * * * to be delivered at San Diego
" to the Bancroft-Whitney Co. or assigns * * *"

The property is then described as " One (1) c. books," and then follow the words:

" Paid $1.15
" Smith
" Prepaid." (R., pp. 9, 10.)

It is then alleged that the steamship thereafter sailed from San Francisco bound to the port of San Pedro " with the merchandise on board, but *notwithstanding* " *said contract of affreightment*, said merchandise *was* " *not delivered to Bancroft-Whitney Company at said* " *port or place of San Diego, or at any other place*, in

"like good order as when received; but, on the con-
"trary, said merchandise was returned to said port of
"San Francisco in a greatly damaged condition by
"reason of having been wet with sea water during said
"voyage, which, by reason of *the negligence of said*
"*steamship company*, its officers or servants, gained
"access to the interior of said ship, where said merchan-
"dise was stowed, to wit, on or about the 30th day of
"April, A. D. 1888."

It is further alleged that in consequence of the injury and damage to said merchandise by sea water, the libelant sustained damages in the sum of two hundred and ten dollars. (R., pp. 5, 6; Libel, Art. II, III, V.)

Had the proceeding been at common law, we submit that under authority of Legge *v.* Tucker, 1 Hurl & Nor., 498, referred to with approbation by the Court in Atlantic & Pacific Railroad *v.* Laird, 164 U. S., 393, cited herein by claimant's counsel, it would clearly have been a declaration in assumpsit and not in tort.

The mere use of the word "negligence" in stating a cause of water entering the ship, does not necessarily constitute the proceeding one in tort, any more than the declaration in "*case*" in Legge *v.* Tucker, constituted that an action in tort and not in assumpsit.

"In a declaration in contract against a common carrier it is common, though not necessary, to allege that the goods were injured by the negligence of himself and his servants."

Gray, J., in School District *v.* Boston & H. & E. R. R. Co., 102 Mass., 552, 557, and cases there cited.

At common law, an action on the *case* was distinguished from one in assumpsit or covenant in that it was not founded upon any contract, express or implied, and a similar division existed in the civil law, in which upon nominate contracts an action distinguished by the name of the contract was given. *Case* was in form *ex delicto* for a wrong unconnected with a contract.

1 Ch. Pl., 110.

Legge *v.* Tucker, 1 Hurl. & Nor., 498, was in form an action on the case, for the negligence of a livery stable keeper in the care and custody of a horse. It was held that the foundation of the action was a contract, and that whatever way the declaration was framed, it was an action of assumpsit. Pollack, C. B., said:

"Where the foundation of the action is a contract, in "whatever way the declaration is framed, it is an action "of assumpsit; but where there is a duty *ultra* of the "contract, the plaintiff may declare in case."

Per Watson, B.: "The action is clearly founded on "contract. Formerly, in actions against carriers, the "custom of the realm was set out in the declaration. "Here, a contract is stated by way of inducement, and "the true question is, whether, if that were struck out, "any ground of action would remain. There is no duty "independently of the contract, and, therefore, it is an "action of assumpsit."

Now, in the case at bar, the relation of the parties to each other was purely contractual. Their respective rights and duties are to be determined solely by the contract of affreightment entered into between them and

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declared on. The action is founded on a contract and not on any common law duty, consequently it is in the nature of an action in assumpsit at common law.

This view is strengthened by the case of Fleming *v.* Manchester, etc., Ry. Co., 4 Q. B. Div., 81. The material parts of the statement of the claim were that:

1. The plaintiff delivered to the defendants, as common carriers, a parcel of goods to be carried by defendants from Sheffield to Dundee.

2. That the defendants accepted the parcel of goods to be safely carried and delivered to the plaintiff at Dundee.

3. That the defendants did not safely carry and deliver the package of goods to the plaintiff at Dundee, but "so *carelessly and negligently* conducted themselves "with respect thereto, that the said parcel of goods was "and is wholly lost."

The defendants having paid into Court a certain sum of money which the plaintiffs accepted in satisfaction of their claim, thereupon applied to a Master to tax their costs, which he refused to do on the ground that the action was founded on a contract within the meaning of the County Courts Act of 1867, 30, 31 Vict. c. 142, sec. 5. (For the provisions of this Act, see Note 1 on p. 82 of the report of the case.)

The decision of the Master having been affirmed at chambers, the Queen's Bench Division, on appeal, ordered defendants to pay plaintiffs' costs. Defendants appealed. For the defendants it was contended that the action was "*founded on contract*," and the plaintiff not entitled to costs. For the plaintiff it was contended that

the action was a *tort*, and, therefore, the plaintiff was entitled to costs. The decision of the Queen's Bench Division was reversed. In its opinion the Court said:

"According to Bryant *v.* Herbert (3 C. P. D. L. R., "389) we have to determine whether the action is "'founded on contract or on tort,' and whether we are "to decide this question by looking at the form of the "pleadings or at the facts, it is clear that this action is "'founded on contract.' By paying money into Court "unconditionally, the defendants have admitted the truth "of the allegation set forth in the statement of claim. "These allegations seem in effect to amount to a charge "that, in consideration of the payment of hire, the de-"fendants promised to carry safely the plaintiff's goods; "and this clearly would have been, under the old forms "of pleading, a declaration in contract." (P. 83.)

So, in Taylor *v.* Manchester, S. & L. Ry. Co., 1 Q. B. Div. (L. R., 1895), 134, 140, the Court, approving of the decision in the case above cited, say:

"* * * If an action be brought against a common "carrier for non-delivery of goods, it is founded on a "contract, as was held in Fleming *v.* Manchester S. & "L. Ry. Co., and negligence need not be averred and "proved; so, also, if brought for a non-feasance; for then "the plaintiff cannot succeed without proof of a contract "and its breach." (140.)

In Baylis *v.* Lintott, 8 C. P. (L.R.), 345, the action was against a carriage proprietor for not securely carrying certain luggage belonging to a person who had hired his carriage. The declaration alleged that in considera-

tion that the plaintiff with her luggage, would become a passenger in such carriage, and a certain reward to be paid by the plaintiff to the defendant in that behalf, the defendant promised to carry the plaintiff and her luggage safely, but did not safely carry the plaintiff's luggage, but so *carelessly and negligently* conducted himself that part of said luggage was lost. Held, that the cause of action set forth in the declaration was "founded on contract."

In Pontifex *v.* Midland R. Co., 3 Q. B. D. (L. R.), 23, 26, the statement of the claim alleged that the plaintiff delivered goods to a railway company as a carrier, consigned to intending purchasers; that afterwards, and before the goods had been delivered to the consignees, the plaintiff discovered that the consignees were insolvent and gave notice to the defendant not to deliver the goods to the consignees, but to hold them to the plaintiff's order; before they were delivered to the consignees, the plaintiff also required the defendant to re-deliver them to him. Defendant refused to do so and delivered them to consignees, who absconded without paying for the goods. It was held that this was an action founded on tort and not on coutract, the action of the defendant amounting to a wrongful conversion of the goods. In the course of its opinion, on p. 26, the Court said:

"If there is an express contract, and the act com-
"plained of is a breach of it, the action is clearly foun-
"ded on contract."

Chapman *v.* State of California, 104 Cal., 690. This was an action to recover damages for the loss of a quantity of coal occasioned by the breaking down of a public

wharf on which it was deposited. The declaration alleges that the defendant in consideration of wharfage charges paid to its officers, received upon this wharf 150 tons of coal belonging to the plaintiff and to be removed by him from such wharf, and that the wharf broke and gave way, "by reason of the *negligence, omission and* "*carelessness* of the defendant, its officers and agents, in "failing and *neglecting* to keep said wharf in good and "sound condition and repair."

The defense was that the State was not liable in damages for the negligent acts of its officers engaged in discharging ordinary official duties, and if the action was to be regarded as one for the recovery of damages arising out of the negligence of the officers of the State in the discharge of strictly governmental duties, it could not be sustained.

The Court held that the action was not founded upon negligence constituting a tort, pure and simple, and unrelated to any contract, but was substantially an action for damages on account of a breach of contract, and that the alleged negligence and consequent loss of the goods entrusted to the wharfinger, was a breach of the terms of his contract, and his liability therefor could have been enforced at common law by an action of assumpsit. Citing Chitty of Pl., 114; Baker *v* Liscoe, 7 Term Rep., 171.

Now, if the facts set forth in the libelants' pleadings do not show that they have elected to sue on the contract we think it will be quite difficult to formulate a pleading in admiralty that will show such an election without

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resorting to the technical forms of pleading at common law, which is not required in a proceeding in admiralty.

IX.

THE STEAMSHIP "QUEEN OF THE PACIFIC" WAS UNSEAWORTHY WHEN ON THE 29TH DAY OF APRIL, 1888, SHE SAILED FROM SAN FRANCISCO ON THE VOYAGE TO SAN DIEGO AND WAY PORTS.

1.—WARRANTY OF SEAWORTHINESS.

"In every contract for the carriage of goods by sea, "unless otherwise expressly stipulated, there is a war- "ranty on the part of the shipowner that the ship is "seaworthy at the time of beginning her voyage, and "not merely that he does not know her to be unsea- "worthy, or that he has used his best efforts to make "her seaworthy; and this being so, his undertaking is "not discharged because the want of fitness is the "result of latent defects."

The Caledonia, 157 U. S., 124.
Work *v.* Leathers, 97 U. S., 380.
The Edward J. Morrison, 153 U. S., 380.

2.—WHAT CONSTITUTES SEAWORTHINESS.

"The vessel must be so tight that water will not "reach the cargo, so strong that the ordinary applica- "tions of external force will not spring a leak or sink "her, so sound that she will safely carry the cargo "through the ordinary shocks and vicissitudes of sea and "weather to which she must every day be subjected. If "she is capable of this she is seaworthy; if she is not "she is unfit for the navigation. No other test can be

" given, and this must be determined by the facts in " each particular case."

The Northern Belle, 9 How., 526, 530.
Putnam *v.* Wood, 3 Mass., 481.
Dupont de Nemours *v.* Vance, 19 How., 162.
Work *v.* Leathers, 97 U. S. 379.
Angel on Carriers, p. 150, Sec. 173.

3.—Presumption of Unseaworthiness.

Although it may be presumed that a vessel is seaworthy when she sails, still if soon after sailing she springs a leak without having encountered a peril sufficient to account for it, the presumption is that she was unseaworthy when she sailed.

" If a defect without any apparent cause be developed, " it is to be presumed it existed when the service " began."

Work *v.* Leathers, 97 U. S., 379.
Talcott *v.* Commercial Ins. Co., 2 Johns, 122, 129.

In this last case the vessel sailed in the morning, and at ten o'clock the same evening sprang a leak, and at two o'clock the next morning she filled with water, capsized and became a wreck. The cause of the leak could not be discovered. It did not appear that the vessel had struck the ground or met with any accident that could occasion a leak. A verdict having been rendered for the plaintiff, the Supreme Court of Judicature granted a new trial.

In the course of its opinion, the Court said:

"It has been urged by the plaintiff's counsel that every "vessel insured is *prima facie* to be deemed seaworthy.

" * * * * * * *

"This presumption is founded on the benignity of the "law, which will not presume a party to have violated his "implied stipulation; but when a state of facts is presented "from which a conclusion is to be deduced, in my opin- "ion this presumption of seaworthiness deserves no con- "sideration. 'For when,' says Marshall, (2 Marshall, "305), 'the ship becomes unnavigable or incapable of "'proceeding on the voyage insured, all the writers "'agree, that the presumption shall be, that this pro- "'ceeded from the age, rottenness or other defect of the "'ship, unless it be made to appear to have been occa- "'sioned by sea damage, or some unforseen accident.'

"If a vessel, after she commences her voyage, be- "comes unfit to prosecute it, without having been ex- "posed to any extraordinary peril of the sea, this may "authorize a strong presumption of unseaworthiness at "her departure, as to require strong evidence from the "assured to repel this presumption."

Court *et al. v.* Delaware Ins. Co., 2 Wash., 375.

"If it appears from the proof and circumstances attend- "ing, that the vessel was lost by springing a leak and "foundering in moderate weather, the presumption is "that this arose from weakness and internal defect, and "the burden of proof is upon the plaintiff to show that it "arose from stress of weather, or from collision or other

"external injury of an extraordinary character, coming "under the denomination of perils the sea."

Paddock *v.* Franklin Ins. Co., 11 Pick., 227, 237.

"Where a ship becomes so leaky or disabled as to be "unable to proceed on her voyage *soon after sailing on* "*it*, and this cannot be ascribed to any violent storm, "or extraordinary perils of the seas, the fair and natural "presumption is, that it arose from causes existing be- "fore her setting out of her voyage, and consequently "that she was not seaworthy when she sailed."

1 Arnold on Ins. (Am. Ed.), 689, 686.*

"If the underwriters can show that the ship, shortly "after sailing, without any visible or adequate cause, be- "came leaky, or otherwise incapable of performing the "voyage insured, this will be presumptive proof that she "was unseaworthy at the commencement of the risk."

2 Arnold on Insurance, 1361.

"Where the inability of a ship to perform its voyage "becomes evident soon after leaving port, and it found- "ers without stress of weather or other adequate cause "of injury, the presumption is that this liability existed "before setting sail, and that it is due to some latent "defect which rendered the vessel unseaworthy."

Walsh *v.* Washington Ins. Co., 32 N. Y., 427, 436.

The Planter, 2 Woods, 490.

See also The Gulnare, 42 Fed R., 861.

Higgie *et al. v.* American Lloyds, 14 Fed., 143.

Munroe *v.* Vandam, 1 Park on Ins., 469.

Marshall on Ins., 367.

After sailing from San Francisco on the afternoon of the 29th day of April, 1888, and up to 2:30 A. M., of the following day, April 30th, the ship encountered no gales or heavy seas, but only such winds and seas as are ordinarily encountered at that season of the year on a voyage from San Francisco to San Diego.

CAPTAIN ALEXANDER testified that after leaving San Francisco they had the wind about "two points abaft the "beam * * a leading wind."

"*Mr. Andros*—Q. In going down the coast upon "your various trips, you encountered wind and sea as "heavy as there were upon this occasion? A. Yes, "sir.

"Q. It was about what they call the ordinary weath-"er for that season of the year?

"A. No—ordinary weather? Yes, it was just the "same, like our north winds in the spring of the year; "like I had last trip. I had one trip the same kind of a "wind and sea going down.

"Q. The winds vary according to the season in "strength and velocity?

"A. The north winds do; yes." (R., p. 97.)

* * * * * *

"*Mr. Andros.*—Q. Are you aware that at any time "during her voyage that the ship struck anything until "she sunk? A. I am not.

"Q. She had no collision?

"A. Not to my knowledge. Nothing was reported "to me.

"Q. If there had been anything serious of that sort

" it would have been the business of the officer on deck,
" if he did his duty, to report it?

" A. Most decidedly so.

" Q. If anything unusual happened at any time dur-
" ing the trip, it would have been the duty of the officer
" of the deck to report that to you?

" A. Most decidedly so.

" Q. And when the leak was discovered, that was
" reported to you?

" A. Yes, sir." (R., p. 105.)

It appears from the testimony that the ship had a stringer or fender running along the side of the ship from a point about 20 feet from her stem to a point about 20 feet from her stern, and that the outer edge of this was about 14 inches out from the ship's side. (R., p 98.)

" *Mr. Towle.*—Q. With reference to that guard, how
" did the seas run alongside the 'Queen' upon that
" voyage? A. How did the sea run?

" Q. Yes, with reference to the guard. Did the sea
" run above it or below it, or how?

" A. It was running above it. Of course, the sea
" comes along. It was not all the time above it. Off
" and on. The sea would wash over the guard, away
" above the guard.

" Q. In your best judgment how frequently on the
" trip would the sea be above the guard along near the
" amidships of the vessel?

" A. I suppose four or five times a minute. Make it
" four times.

" *The Court.*—Q. When the vessel was on an even
" keel in still water, how would the guard be?

"A. It would be above the water.

"Q. How much?

"A. I am under the impression it was a foot and a "half above water. That is, the way she was loaded at "the time. If she was light it would be above that. "I am under the impression that guard was a foot or a "foot and a half above water. I may be mistaken, but "I would say that.

"*Mr. Towle.*—Q. Whatever the height of the guard "may have been above the water, it is your estimate that "the waves ran above the guard as often as you have "stated? A. Yes, sir." (R., p. 99.)

* * * * *

"*Mr. Andros.*—Q. You have spoken of a guard. I "want to find out something about that. How many feet "below the covering board was that guard placed?

"A. I suppose about eight feet below the covering "board.

* * * * *

"Q. You have seen a sea break over the top of that "on other occasions? A. Yes, oftentimes.

"Q. Nothing extraordinary about that, was there?

"A Not as far as the sea breaking over, no. I have "seen it lots of times break over the guard." (R., p. 101.)

The cause of the leak can, therefore, be attributed only to some defect, known or unknown, in the vessel when she sailed from San Francisco, and whether known or unknown is immaterial, so that it constitute unseaworthiness in the vessel at the time of her sailing.

If the carrier had shown the nature, location and extent of the defect in the ship which caused the leak, then the question whether it was caused by an excepted peril, or by some latent or other defect in the ship, would have been, comparatively, of easy solution.

"If a vessel during a voyage has leaked so much as "to injure the cargo, or render a jettison of it necessary, "one mode of testing seaworthiness is to ascertain what "defects, occasioning the leakage, were found in the "vessel at the end of the voyage, and which, if any, "existed when it was begun; and if any of the latter be "found, the remaining inquiry is, whether they are such "as to render the vessel incompetent to resist the ordi-"nary attacks of the sea, in the course of a particular "voyage, without damage or loss of cargo."

Dupont de Nemours *v.* Vance, 19 How., 162, 167.

The shipowner not having shown or attempted to show that the leak was consequent on an excepted peril, nor having shown or attempted to show the place, extent or nature of the defect by which sea water,—the proximate cause of damage to libelants' merchandise,—gained access to the interior of the ship, from which it might have been determined whether the defect arose from some excepted peril or from such an infirmity of the ship existing at the time she sailed on her voyage as to render her unseaworthy, raises against him the strongest presumption that she was unseaworthy when she sailed on the voyage in question, and this presumption should be resolved against him.

X.

The 26th assignment of error is as follows: "The "finding of the Court that an open deadlight on the "steamer "Queen" was the occasion of the damage to "said merchandise, is without any evidence to sustain "it, and is contrary to the evidence, and was and is and "is here assigned as error." (R., p. 191.)

No such finding was made by the District Judge. In his opinion (R., p. 163), referring to the deadlights, he says "Had one of them been negligently left open "when the vessel sailed the flow of water through such "an opening into the compartment might account for "the leak. The claimant introduced evidence tending "to show that the deadlights were all closed when the "vessel sailed from San Francisco, removing the pre-"sumption of unseaworthiness that might attach to the "unexplained condition of these openings at that time".

On p. 164 of the Record, he says, "The testimony "* * * does seem to point to an open deadlight as "the cause of the leak in the water-tight compartment."

He then refers to the facts which seem to point to this condition of things. (R., pp. 164-5-6.) The Court, after referring to the case of the "Majestic" where the deadlights were found to have been forced open by some accident and under such circumstances that the Court held it was "reasonable to infer it was "caused by an apparent and adequate cause rather than "by one which rests entirely upon surmise, and we are, "therefore, led to conclude that a blow from one of the

" floating planks inflicted the injury. * * * It was " an unanticipated peril of the sea."

" In the present case the evidence furnishes no such " explanation of the extraordinary occurrence, and the " Court is compelled to decide the case upon the weight " of presumption. In fact, as the proof now stands, " although claimant contends that the damage by sea- " water to the goods must be attributed to some " accident or danger of the sea or of navigation, he has " failed to show an accident, danger or casualty of the " sea from which the leak can be reasonably, or at all, " inferred. Nor has he accounted for the leak at all, *and* " *so far as the evidence in the case is concerned, the* " *Court is left in ignorance as to its cause.*" (R., pp. 166–7.)

" *The evidence is silent as to the cause of the leak,* " *and even the exact locality where the water gained* " *access to the vessel, was not disclosed by the evidence.*" (R., p. 158.)

This language entirely negatives the idea that the Court found that the leak was caused by an open dead-light.

XI.

THE 28th, 29th, 30th AND 31st ASSIGNMENTS OF ERROR RELATING TO THE RELATIONS EXISTING BETWEEN THE MAIDEBURG GENERAL INSURANCE COMPANY AND THE FIRM OF HELLMAN, HAAS & COMPANY, AND A. HAAS, J. BARUCH AND H. W. HELLMAN, SURVIVING PARTNERS OF THE FIRM OF HELLMAN, HAAS & COMPANY, WHO ARE THE LIBELANTS IN THIS CASE (R., p. 191), ARE SEVERALLY WITHOUT MERIT.

If the damaged merchandise of Hellman, Haas &

Company was uninsured, then the surviving partners had a clear right to bring the suit in their own name and for their own benefit. If, on the other hand, they were insured, then the insurance company was subrogated to their rights and could maintain the action in the name of the surviving partners of Hellman, Haas & Company. So that, whether the merchandise of Hellman, Haas & Company was or was not insured, or if insured and the loss paid, and this suit is maintained for the benefit of the insurance company paying in whole or in part the loss, is no concern of the claimant.

The Potomac, 105 U. S., 630, 634;
Hall & Long *v.* Railroad Company, 13 Wall., 367;
Liverpool Steam Co. *v.* Phœnix Ins. Co., 129 U. S., 397;
Phœnix Ins. Co. *v.* Erie Transportation Co., 117 U. S., 312, 320–21.

The owner of the goods insured may bring an action in his own name and account to his underwriter for the damages recovered up to the amount which the latter has paid, or the underwriter may bring in the name of the assured and account to him for any excess after having reimbursed himself to the amount which he has paid under the policy. It is no affair of the carrier who it is that will have the benefit of the recovery. It is sufficient for him to defend against any recovery at all, and such defense in no way depends upon how the damages that may be recovered against him may be subsequently disposed of.

XII.

IN THE COURT BELOW AND IN THE BRIEF ACCOMPANYING HIS PETITION FOR THE WRIT IN THE PRESENT CASE, THE CLAIMANT INSISTED AND INSISTS:

"*That the carrier's whole duty to the shipper is performed when it furnishes a seaworthy vessel, properly officered, manned and equipped, and is guilty of no negligence in handling or stowing the goods, or in navigating the vessel on the voyage.*"

This proposition as an abstract one, we do not controvert. As applied to this case its infirmity is, that it necessarily assumes that the ship was seaworthy at the inception of the voyage, which is a fact denied by the libelants. Their merchandise was damaged by seawater that entered the ship during the voyage, so soon after the commencement of it and under such circumstances as to raise a presumption that the vessel was unseaworthy when she departed on her voyage; and this presumption the claimant has not even attempted to rebut by proof that this leak was brought about by an excepted peril, and until he has done this he has not shown "an entire seaworthiness of the vessel to have existed at the inception of the voyage."

XIII.

IN THE COURT BELOW AND IN HIS BRIEF ACCOMPANYING HIS PETITION FOR THE WRIT IN THIS CASE, THE CLAIMANT CONTENDED AND CONTENDS:

"*That the stranding of the 'Queen' at Port Harford was a peril of the sea, and the approximate cause of the goods being wet with seawater, and that the 'Queen'*

"*was prima facie, and until negligence upon the voyage*
"*was shown, released from liability for damage so*
"*caused, by the express stipulations of the bill of lading.*"

Admitting that a stranding, either fortuitous or voluntary, is a peril of the sea, it is, under the facts and circumstances of this case, immaterial. If the leak in the ship was caused by a sea peril, that ends the controversy. If, on the other hand, the leak was caused by the unseaworthiness of the ship at the inception of the voyage, then the voluntary stranding to avoid a greater disaster to both ship and cargo which would otherwise result from such unseaworthiness, does not constitute a defense against libelant's claim for damages. The breach of the warranty of seaworthiness is not cured by the subsequent stranding of the ship rendered necessary by this breach.

In the Portsmouth, 9 Wall., 682, 684, Justice Strong, in delivering the opinion of the Court, said: "A loss by "jettison occasioned by a peril of the sea is, in ordinary "cases, a loss by perils of the sea. But it is well set- "tled that if a jettison of a cargo or a part of it, is ren- "dered necessary by any fault or breach of contract of "the master or owners of the vessel, the jettison must "be attributed to that fault or breach of contract, rather "than to the sea peril, though that may also be present "and enter into the case."

And in Lawrence *v.* Minton, 17 How., 100, 111, the Court said: "There can be no doubt that a loss by jettison occasioned by a peril of the sea is a loss by peril of the sea. In that case the sea peril is deemed the proximate cause of the loss. But if a jettison of a cargo be-

comes necessary in consequence of any fault or breach of contract of the master or owners, the jettison is attributable to that fault or breach of the contract, and not to a sea peril, though that also be present and enter into the case. This distinction is familiar in the law of insurance.

General Mutual Ins. Co. *v.* Sherwood, 14 How., 365, and cases there cited.

In this case, did the necessity for the jettison arise from any fault or breach of contract of the master or owners?

Now, we can see no difference in principle whether a sacrifice is made by a jettison of the cargo or by a stranding of the vessel. The latter is as much attributable to a breach of the contract of affreightment in respect to the seaworthiness of the ship as it is in the case of a jettison. The object and purpose of both are the same.

Under the pleadings and proofs and the rulings of the Court below, as disclosed by the record, it is respectfully submitted that there is no error apparent therein, and that the judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

MILTON ANDROS,
Counsel for Libelants and Respondents.

Supreme Court of the United States.

No. 130.—October Term, 1900.

The Queen of the Pacific. } On certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[January 7, 1901.]

This was a joint libel by the Bancroft Whitney Company, a California corporation, and the firm of Hellman, Haas & Company against the steamship "Queen of the Pacific," owned by the Pacific Coast Steamship Company, to recover damages to certain miscellaneous merchandise shipped April 29, 1888, at San Francisco, to consignees at San Pedro in the State of California.

The contracts of affreightment were evidenced by bills of lading in the usual form and with the usual exception of perils of the sea, and amongst others with the following stipulation:

"It is expressly agreed that all claims against the P. C. S. S. Co., or any of the stockholders of said company, for damage to or loss of any of the within merchandise, must be presented to the company within thirty days from date hereof; and that after thirty days from date hereof, no action, suit or proceeding, in any court of justice, shall be brought against said P. C. S. S. Co., or any of the stockholders thereof, for any damage to or loss of said merchandise; and the lapse of said thirty days shall be deemed a conclusive bar and release of all right to recover against said company, or any of the stockholders thereof, for any such damage or loss."

The steamship left San Francisco about two o'clock in the afternoon of April 29, 1888, bound for the port of San Diego and intermediate ports, having on board a cargo of general merchandise and upwards of two hundred persons. A little more than twelve hours after she sailed, and about half-past two o'clock in the morning of the 30th, the steamer was seen to have sprung a leak and to be taking in water through a watertight compartment known as the starboard alleyway. At this time she had a list of from five to eight degrees to starboard, which, when she reached Port Harford, four or five hours afterwards, had increased to an angle of thirty degrees. When about two hundred and fifty or three hundred yards from the wharf, where she usually made her landing, she took the bottom in about twenty-three feet of water, and in about twenty minutes thereafter filled, sank and lay in a helpless condition for three or four days. A diver, procured for that purpose, after repeated efforts, found the leak and stopped it, whereupon the water was pumped out of the vessel, and she

was towed to San Francisco, where she arrived the next day. Her cargo was all discharged upon the wharf, and delivery thereof tendered and accepted by the several owners, who gave the usual average bonds. On May 19, that portion of the cargo belonging to Hellman, Hass & Company was sold by them at public auction. No claim for damage to the merchandise was made upon the owners of the Queen prior to the sale, nor were they invited to such sale. In short, nothing further appears to have been done for nearly four years, though the steamer was constantly running to and from San Francisco, when on April 28, 1892, this libel was filed. Exceptions to the libel were interposed and overruled, (61 Fed. Rep. 213,) and the case subsequently went to a hearing upon libel, answers and testimony, and resulted in a decree for the libellants for the full amount of their claim, (78 Fed. Rep. 155,) which was affirmed by the Court of Appeals. (94 Fed. Rep. 180.) Whereupon this writ of certiorari was granted.

Mr. Justice BROWN delivered the opinion of the Court.

The Court of Appeals in its opinion dwelt upon several propositions arising upon the pleadings and evidence, but in the view we have taken of the case we shall find it necessary to discuss but one, which is, in substance, that the libellants did not, as required by the bill of lading, present to the company their claims for damage to the merchandise within thirty days from the date of the bills of lading, April 27 and 28, 1888. There is no pretence of a compliance with this condition. Two answers are made to this defense: First, that the limitation applies only to claims against the steamship company or any of the stockholders of said company, and not to claims against the vessel; second, that the limitation is unreasonable.

1. The first objection is quite too technical. It virtually assumes that there were two contracts, one with the company and one with the ship, the vehicle of transportation owned and employed by the company; and that while the company as to all its other property is protected by the contract, as to this particular property, used in carrying it out, it is not so protected. But if such be the case with respect to this particular stipulation, must it not also be so with respect to the other stipulations in the bill of lading to which the company is a party but not the ship? Thus, "the responsibility of said company shall cease immediately on the delivery of the said goods from the ship's tackles." Can it be possible that the responsibility of the ship shall not cease at the same time? "The company shall not be held responsible for any damage or loss resulting from fire at sea or in port; accident to or from machinery, boilers or steam," &c.; but shall the company be exempt and not the ship? "It is expressly understood that the said company shall not be liable or account-

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able for weight, leakage, breakage, shrinkage, rust, &c., . . . nor for loss of specie, bullion, &c., unless shipped under its proper title or name, and extra freight paid thereon;" but shall the ship be liable for all these excepted losses notwithstanding that the company is exonerated? These questions can admit of but one answer. There was in truth but one contract, and that was between the libellants upon the one part, and the company in its individual capacity and as the representative of the ship, upon the other.

There is no doubt of the general proposition that restrictions upon the liability of a common carrier, inserted by him in the bill of lading for his own benefit and in language chosen by himself, must be narrowly construed, still they ought not to be wholly frittered away by an adherence to the letter of the contract in obvious disregard of its intent and spirit. It is too clear for argument that it was the intention of the company to require notice to be given of all claims for losses or damage to merchandise entrusted to its care, and as such damage could only come to it while the merchandise was upon one of its steamers or in the process of reception or delivery, and as the owner would have his option to sue either *in rem* or *in personam*, it could never have been contemplated that in the one case he should be obliged to give notice and not in the other. In either event, the money to pay for such damage must come from the treasury of the company; and we ought not to give such an effect to the stipulation as would enable the owner of the merchandise to avoid its operation by simply changing his form of action. It would be almost as unreasonable to give it this construction as to hold that it should apply if the action were in contract, but should not apply if it were in tort. The "*claim*" is in either case against the company, though the *suit* may be against its property.

2. The question of the reasonableness of the requirement is one largely dependent upon the object of the notice and the length of the voyage. Thus, a notice which would be perfectly reasonable as applied to steamers making daily trips, might be wholly unreasonable as applied to vessels engaged in a foreign trade. Indeed, a thirty-day notice, such as is involved in this case, would be wholly futile as applied to a steamship plying between San Francisco and trans-Pacific ports. Notice might also be deemed reasonable, or otherwise, according to the facts of the particular case. Thus, if the Queen had been driven out to sea and was not heard from for thirty days, obviously the provision would not apply, since its enforcement might wholly destroy the right of recovery. The question is whether under the circumstances of the particular case the requirement be a reasonable one or not.

The Queen was engaged in short trips and in general trade to San Diego, doubtless delivering merchandise in different parcels and in differ-

ent quantities to large numbers of consignees at the termini, and at intermediate ports. If any damage occurred to such articles it was of the utmost importance to the company to have the claim made as soon as possible, while the witnesses, who must often be sailors, difficult to find and still more difficult to retain, might be reached, and while their memory was fresh, that the company might then know whether it had a defense to the claim. In case of a disaster occurring on such voyage, it could hardly fail to be known in San Francisco within three or four days from the time the steamer left there. As a matter of fact, the bills of lading in this case were signed April 27 and 28; the loss occurred on April 30, and notice was mailed to the shippers on May 2. There were thus over three weeks during which they were at liberty to make inquiries, examine into the facts, and determine whether to make claim upon the company or not.

Similar stipulations requiring notices of losses to be given to common carriers, express companies, telegraph and insurance companies have so often been upheld by the courts, when reasonable, that a review of the cases is quite unnecessary. Indeed, this is not the first time that the question has been before this court.

In *Express Co.* v. *Caldwell*, (21 Wall. 264,) an agreement by an express company that it should not be liable for any loss of or damage to any package unless claim should be made therefor within ninety days from its delivery to the company, was held to be one which the company could rightfully make, since the time for transit required only about a day. In *Lewis* v. *Great Western Railway Co.*, (5 H. & N. 867,) there was a provision in the bill of lading that no claim for damage should be allowed, unless made within three days after the delivery of the goods. This was held to be valid. "The company, wishing to guard against any allegation of neglect in the delivery of goods confided to them, require that when the goods are delivered they should be promptly examined and complaint made at once if there is occasion for it. Such a condition is perfectly reasonable. The law allows persons to make their own bargains in matters of this sort."

In *Goggin* v. *Kansas Pacific Railway Co.*, (12 Kan. 416,) there was a requirement that claims for damage to live stock should be made in writing, before or at the time the stock was unloaded. Plaintiff alleged that he had signed the bill of lading under protest, and also verbally notified the servants of the company of the damage, before the cattle were unloaded from the cars, and immediately after giving verbal notice, sought for writing materials to make out a written notice, but before he was able to find them, the cattle were unloaded, so that no notice was given. A demurrer was sustained to this reply, the court holding that his inability to procure writing materials was no excuse for not giving notice for more than a year afterward. "The parties were competent to make the con-

tract, and did make it, and it must be held good, unless it is contrary to public policy." See also *Wolf* v. *Western Union Tel. Co.*, (62 Pa. St. 83.)

In *Adams Express Co.* v. *Reagan*, (29 Ind. 21,) where a package was shipped from a town in Indiana to Savannah, Georgia, during the civil war, when transportation was much interrupted, it was held that a condition that the carrier should not be liable unless a claim was presented within thirty days after shipment was unreasonable. It was put upon the ground that the country, being in an unsettled condition, occasioning great delays in shipments and in the transmission of mails, an attempt to incorporate this condition into their contract was placing it within the power of the company by a delay, which under the circumstances would, perhaps, not have been unreasonable, to prevent any claim for loss or damage, however gross may have been its negligence. It appeared that the plaintiff's agent delayed shipping the property for a month or more until Savannah was taken by the Federal troops, when he delivered it to the company and the receipt was executed. That the case was determined upon the particular facts is evident from the subsequent case of *United States Express Co.* v. *Harris*, (51 Ind. 127,) in which a stipulation that the company was not to be liable for any loss, unless the claim therefor should be made in writing, at the office of shipment, within thirty days from the date of said receipt, was held to be binding and valid, though it was doubted whether the claim must be made at the office of the company, where the property had passed into the hands of another carrier, or might be made in such case upon some agent or officer chargeable with the loss. The former case was distinguished as being applicable to its own facts.

There are doubtless some cases to the contrary, where upon the particular facts the condition was held to be unreasonable. In *Railroad Co.* v. *Harris*, (67 Tex. 166,) the requirement was that the shipper should give notice in writing of his claim to some officer of the company, or its nearest station agent, before the cattle were removed from their place of destination, and before they were mingled with other stock. The shipment was from an interior town in Texas to Chicago, the line of railway did not extend to the point of destination, and both parties understood that the carrier would transport the cattle from its own road over a connecting road. It was held that the failure of the answer to show that the carrier had an officer or agent so situated that the contract to give notice to such officer or agent was reasonable, was fatal on demurrer, and that no presumption could be indulged that the carrier had an officer near the place of destination. This case was evidently decided upon its special facts. In another case decided by the Supreme Court of Texas, (*Pacific Express Co.* v. *Darnell*, 6 S. W. Rep. 765,) a piece of machinery was delivered to an express company in Texas for shipment to Baltimore. The contract of shipment provided that the company should not be held liable for

any claim arising from the contract, unless it were presented within sixty days of the date of the contract. Held, that the failure to present the claim was not a bar to the right of recovery, the restriction of presentment of claims without reference to the time of loss being unreasonable. The court seemed to assume that the stipulation imposed a restriction which in many cases would deny a right of action, and thereby permit the carrier to contract against his negligence, which is never allowed. The opinion seems to have gone off upon the point that, while the notice as applied to the facts might have been reasonable, it would be unreasonable when applied to a different state of facts. It is unnecessary to say that if, under the circumstances of a particular case, the stipulation were unreasonable, or worked a manifest injustice to the libellants, we should not give it effect. All that was decided in *Wescott* v. *Fargo*, (61 N. Y. 542,) was that a similar limitation of thirty days was pleaded as a condition precedent to the plaintiff's right to recover, when it should have been set up in the answer. See also *Southern Express Co.* v. *Caperton*, (44 Ala. 101.)

Other analogous limitations upon the common law liability of a carrier, not operating to restrict his liability for negligence, have been sustained by this court, viz., exempting the carrier from liability from losses by fire occasioned without his negligence, (*York Co.* v. *Central Railroad*, 3 Wall. 107; *Bank of Kentucky* v. *Adams Exp. Co.*, 93 U. S. 174); a restriction in value upon the property shipped, (*Railroad Co.* v. *Fraloff*, 100 U. S. 24; *Hart* v. *Penn. R. R. Co.*, 112 U. S. 331); limiting its liability upon through shipments to losses occurring upon its own line, (*Railroad Co.* v. *Pratt*, 22 Wall. 123); and providing that in the case of loss the carrier shall have the full benefit of any insurance that may be effected upon the goods, (*Phoenix Ins. Co.* v. *Erie Transportation Co.*, 117 U. S. 312). Indeed, in *Railroad Co.* v. *Lockwood*, (17 Wall. 357,) in an elaborate opinion by Mr. Justice Bradley, it was held by this court that common carriers may impose almost any just and reasonable limitation upon their common law liability, not amounting to an exemption from the consequences of their own negligence. The methods of transportation have changed so radically during the century which has just closed, that it seems almost necessary to the proper protection of a carrier, in transacting the enormous business of railway and steamship lines, that he should have the power by just and reasonable limitations incorporated in his contract, or brought to the attention of his shippers, to place some restrictions upon the unlimited liability of the common law, particularly where articles of great value, such as jewels, money, bullion, laces and precious stones, are transported without disclosing their contents, or articles or animals of exceptional value, such as race horses, are carried without information of their character; and that persons intending to make claims for losses should manifest their election to do so as soon as the circum-

stances can by reasonable diligence be ascertained. The law recognizes the fact that the measure of liability originally applied to a carter's wain or a waterman's hoy may often be illy adapted to the exigencies of modern commerce.

There is no hardship to the libellants in giving effect to the stipulation in this case. As was said of a similar condition in *Express Co.* v. *Caldwell*, (21 Wall. 264, 268): "It contravenes no public policy. It excuses no negligence. It is perfectly consistent with holding the carrier to the fullest measure of good faith, of diligence and capacity, which the strictest rules of the common law ever required, and it is intrinsically just, as applied to the present case." The loss was known to the shippers within three days after it occurred. The steamer was then and continued to be in port, and the facts were easily ascertainable. Under the stipulation the company had a right to assume that the proper inquiries had been made, and that the shippers were either satisfied that the company was not liable, or that they had elected to rely upon their policies of insurance. Instead of giving notice libellants permitted four years to elapse before beginning suit, although both the ship and the company were readily accessible. True, the Court of Appeals found there was no change of circumstances and no loss of testimony in the meantime; but that is not material. The question concerns the binding effect of the stipulation. Had the ship been transferred to a *bona fide* purchaser there certainly would have been, had the witnesses whose testimony could explain the loss have disappeared, there probably would have been, laches, which would render the claim stale, irrespective of the stipulation; but the stipulation itself would be invalid only upon showing that under the circumstances of the particular case its enforcement would work a manifest injustice. In this view it is unnecessary to consider whether the limitation of thirty days for the commencement of suit be reasonable or not.

We are of opinion that the clause in question was perfectly reasonable, and the decree of the Court of Appeals must therefore be reversed, and the case remanded to the District Court for the Northern District of California with directions to dismiss the libel.

True copy.

Test:

Clerk Supreme Court, U. S.